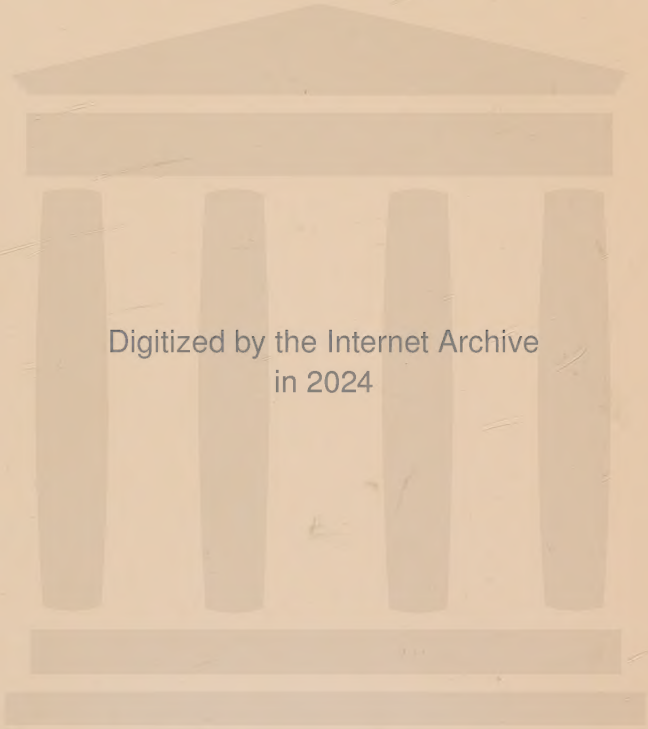

Here IENKINS stands, who thundring from ye Tower
Shook the bold Senats Legislative Power.
Six of whose words twelve Reames of Votes exceed
As mountains mov'd by graines of mustard-seed
Thus gasping Lawes were rescu'd from the Snare.
He that will save a Crowne must Know and Dare.

J. Berkenhead

JUDGE JENKINS

THE LEARNED, LOYAL AND COURAGEOUS JUDGE

WHO WAS KEPT PRISONER IN THE TOWER, NEWGATE AND ELSEWHERE FOR MANY YEARS AFTER BEING SENTENCED TO DEATH BY THE HOUSE OF COMMONS

COLLECTED AND EDITED BY
WILLIAM H. TERRY
BARRISTER-AT-LAW

LONDON
GRANT RICHARDS AND HUMPHREY TOULMIN
AT THE CAYME PRESS LIMITED
21 Soho Square
1929

Printed in Great Britain
at the BURLIEGH PRESS, *Lewin's Mead*, BRISTOL

FROM A CONTEMPORARY TRACT

Brave Limb of Law—great England's statute prop
Whom Tyrants neither can make stoop or stop
Against their Ordinance—Thou—thy cannon bringest
They un-King Charles—and Him again thou King'est
For Laws and Statutes Human and Divine
Thy knowledge makes thy true allegiance shine
And 'tis more easy for thy foes to be
Three Kingdoms' ruin—than to conquer Thee.
Stout heart of oak whom no false private end
Corrupts, but dares to break, but not to bend
Affection's fire hath burnished bright thy fame
All Britain is embroidered with thy name
And Wales—Thy honour no eclipse can shade
Because thou did'st produce so brave a blade
Grave, reverend Jenkins who with pen and word
Supports the scales of justice and her sword.
Continue still to call a spade a spade
To speak and write truth—is thy only trade.

ANON.

FOREWORD

LAW is not so dull a study as some men would have it, nor are its bounds restrained to the ordinary actions and pleas of "a Nokes" and "a Stiles" about a carve of ground, etc. No—the profession is farre more noble and as its basis is reason improved with logic, so its pyramis is policy crowned with History and Philosophy.

Written in 1647 *by* H. P. (*see page* 100).

CONTENTS

INTRODUCTION

It has been a surprise to me, for some years, that no one has thought fit to collect and publish the particulars concerning that brave old Judge Jenkins, who caused so much interest and excitement in his day, for beyond the incomplete papers in Lord Somers' Historical Tracts and elsewhere published more than a century since, it is necessary to go back to over double that period to obtain the full details of the Judge's case.

There have been biographies of Lords Chancellors and Lords Chief Judges in plenty, but here is a puisne Judge, equal to any in learning, and of a certainty far surpassing the majority of them in those qualities of manhood and courage which must have endeared him to the people of his own, as it undoubtedly ought to those of all times, of whom comparatively little is known to any but to a few antiquaries, though the Judge made a considerable stir in his day, and had he had his way and been permitted to die a martyr to his convictions there is but little doubt that he would have held a recognized place in history. As it is, he is almost unknown even to lawyers, and remains at present unremembered by the Inn of Court to

which he belonged. He left behind him, it is true, a Book of Law Reports, which I have had the curiosity to look into. This is a record of the Reports of eight hundred cases "solemly adjudged in the Exchequer Chamber or upon Writs of Error," and was published originally in French and Latin, but translated and republished by subscription in 1734. The subscribers to the issue were mostly barristers or legal publishers of London and New York, including a certain Richard Nichols, described as Postmaster of the latter city, which is a curiosity in itself, indicating, as it does, a combination of occupation with an uncommon interest some forty or fifty years before the War of Independence.

These Reports of Judge Jenkins have not entirely lost all practical significance in the English Courts, for in the De Keyser's Hotel Case—a Petition of Right—heard in the Appeal Court (1919, 2 Ch. 197), reference was made to an old case of Lord Sheffield and Ratcliffe (13 Jac.) cited therein. My research was rewarded, however, by finding a Preface to the Reports which is of far wider interest than the Reports themselves. The amusing old Judge there observes : "That Lord Coke and Lord Hobart [then the Chief Judges of the King's Bench and Common Pleas respectively] were two men of great authority and dignity. I knew, marked, observed and revered that noble Pair for many years. Hobart was adorned with the brightest endowments, his eloquence was excellent, his Family honourable and his understanding piercing—in him the sweetest affability was united

with the most venerable gravity and he always had equity before his eyes, which is a most valuable quality in a Judge, because the Law very often is laid down in general terms for it is infinite, and it is impossible for it to take in those things which are yet to come and which may possibly happen. The praise which I have here given to Lord Hobart is a great tribute to his merit.

"Lord Coke had some great virtues. He was a Judge of unalterable integrity. Power could not break him nor favour bend him. He enjoyed the smiles and the frowns of the Court by turns and possessed an immense fortune which he had honestly acquired.* He died at a very advanced age and in the highest estimation. After his death in times turbulent and calamitous to Britons, some of his Books were published in which there are a few passages which ought to be expunged, by which he seems to bridle the Sovereign and give the reins to the people—which few passages, if they are his, that great man, remarkable for his piety, eminent for his learning and a most obedient subject of Kings, did not insert with an ill design and doubtless were he to rise from the Dead, he would take care to expunge them."

Judge Jenkins was no real lover of the Chancery, or of Equity, notwithstanding what he says elsewhere. He thought it had an excess of jurisdiction in examining judgments and suits at Common Law. "That Court (speaking of Chancery Court) ought to do

* It would be interesting to know how far, if at all, as has been alleged, State grants or Monopolies contributed to that immense fortune.—EDITOR.

nothing but compel the execution of Trusts and the Common Law ought to try fraud." He describes variety of judgment and novelty of opinion as those "two plagues." It was, as he says, "amidst the sound of drums and trumpets and surrounded by an odious multitude of Barbarians, broken with old age and confinement in prisons where his fellow subjects grown wild with rage detained him for 15 years together," that this pathetic old figure and grand fighter bestowed many of his watchful hours upon his legal works. In reporting, Jenkins adopted a method then unique, but now generally followed, of giving a short statement of the case and decision, with marginal reference to the authority from which it was taken, and also a note of his own in important cases discussing the principle and furnishing any necessary illustrations, so that his Reports form a commentary on the judicial decisions of the preceding times.

As will be seen, Judge Jenkins was not a great man by any means, except in spirit, but his memory will stand comparison, subject to a few exceptions, with that of the bulk of what Lord Campbell called the grandeur of the Law. Campbell seems to have thought that ennoblement and grandeur were necessarily the same things, and he entirely overlooked the difference in relative values between a list of those who had made a material success in the pursuit of the Law and the more imposing list of all those eminent people in the ancient and modern worlds who began by studying Law and whose subsequent fame, no

doubt, was assisted by that study, but who, nevertheless, could not be persuaded to indulge in its daily practice, for the long line of Chancellors and Lords Chief Justices in England alone has yielded but one great creative and original intellect, who stands in a class apart by himself, and who regarded the practice of the Law from a bread and butter standpoint merely, and as events proved, it would have been better both for his fame and memory had he given less thought to professional success and more to speculative reasoning. Perhaps some future collector, animated with the laudable desire of re-adjusting perspectives, may find an opportunity to prepare and publish summarised biographies of the names and records that such a list might contain.

To return to Jenkins, it must be confessed that he was a dull, fussy, narrow, quarrelsome and, at times, an illogical little man, who overacted his part and overvalued its importance, but of his courage there can be no doubt, for as Anthony à Wood said of him, "He had a heart of oak, was a pillar of the law and a vigorous maintainer of the rights of the Crown, for which he was prepared to sacrifice both his property and his life." Jenkins was, in truth, *facile princeps* amongst the diehards of his time, and his life was very far from being a record of mean sycophancy or political tergiversation, or one devoted to the building up of a fortune and pedigree at the expense of his clients or of a grateful nation.

In his arguments, Judge Jenkins does not invariably show that worship for the name of Coke which one

would expect to find, and which modern lawyers are accustomed to pay, for curiously enough, he resembled him temperamentally, they both possessing the same narrowness, love of precedent and veneration for technicalities. Had Jenkins been able to leave his Bracton and Magna Charta in his chambers or on his village steeple and taken a survey, so to speak, from St. Peter's at Rome he might have broadened his vision and left behind something of interest concerning his contemporaries, for during his long life he must have seen, and probably well knew, Queen Elizabeth, James I, the two Charles's, James Duke of York, Strafford, Laud, Cromwell, Hampden and others, as well as Ben Jonson, Shakespeare, Bacon and Milton. His case is an historic example of the paralysing effect that a too close devotion to any particular walk in life has on some natures. He must have been a sad man when he heard of his royal master on the scaffold, for whom he had fought so valiantly, and a proud man when the power of the revolutionary House of Commons was usurped by its own soldiers, and also at the return of the Monarchy, yet not a word from him on any of these interesting subjects, though he had ample opportunity.

The object, however, of this book is not biographical, but one merely of presenting the arguments pro and con upon which the Judge's case was attacked and defended. It forms an interesting and curious piece of Legal history and Constitutional law for all students. Changes in the Law and in procedure have of necessity taken place since that time, but the

Profession itself, and the public at large, may still benefit from a study of the different points of view by which the arguments are expressed and maintained, for no one who takes the trouble, whatever his vocation in life may be, can but feel strengthened in reasoning power by the experience, and therefore better equipped for his daily task. In these days of narrow specialism the hint given by H. P., adopted as a foreword to this book, is as important, probably more important than when it was written. Moreover, the Bar, the Church and the older Universities cannot always retain a monopoly of higher thinking. The modern universities are introducing philosophy, by way of the science of Economics, into all those new professions connected with Industry, which though in the main still unlearned are at the same time awakening to the importance of mind as well as matter.

W. H. T.

BIOGRAPHY

David Jenkins (1582-1663), Welsh Judge and Royalist, was born at Hensol in Glamorganshire; he took a degree at Oxford, 1600, and was Called to Bar at Gray's Inn, 1609, and elected Reader there in 1625, but refused to act. Later he was opposed to the methods used by Charles I for raising money. In 1640, according to his own statement, he lay under three excommunications, and the examination of seventy-seven articles in the High Commission Court, for opposing the excesses of one of the bishops.

He had been appointed Judge (visiting) for parts of Wales, an honour conferred upon him against his will, for the salary of £80 went but a little way towards his travelling expenses. At the breaking out of the Civil War he remained firmly loyal to the King and overstepping the bounds of his office indicted several Parliamentarians for High Treason. He appears to have borne arms himself. He was taken prisoner at Hereford, on the surprise of that city by the Parliamentary forces, and sent to the Tower.

Being summoned to appear as Defendant in a Chancery suit brought on behalf of an orphan relative, he denied the authority of that Court. He was also impeached for High Treason for not obeying the Houses and brought to the Bar of the House of

Commons. He refused to plead or to acknowledge the authority and was on the point of being sentenced to death, but then fined £1,000, with perpetual custody. Afterwards an Act was passed for his trial in the High Court of Justice but no further steps appear to have been taken and he seems to have lived until the Restoration, partly in prison, or under some sort of restraint.

According to Wood's "Athenæ Oxoniensis," everybody expected that Jenkins would be made one of the Judges in Westminster Hall at the Restoration, and so he might have been would he have given money to the then Lord Chancellor (for which statement the book was publicly burned and Anthony à Wood was fined and expelled the University of Oxford as the author of a libel on the Earl of Clarendon, though the libel has been supported by the authority of John Aubrey and Hearne*), "but Jenkins scorning

* EDITOR'S NOTE.—Whatever truth there may have been in this particular charge, and Anthony à Wood though making public recantation and apology in order to get out of the black book at Oxford, invariably maintained its truth in private, it was not the only count in the indictment against him, for he had also printed "that after the Restoration Glynne was made the King's eldest Serjeant-at-Law by the corrupt dealing of the then Lord Chancellor, whereas he should rather have had a halter, or at least been excepted from the "Act of Oblivion." Now Glynne had been a prime instrument in bringing Strafford to the block, for his speech at the Trial was of immense ability. He had been active against Laud—he was the Parliament's Recorder for the City of London, and had been Oliver Cromwell's Chief Justice and one of his Peers, so this charge against the Chancellor at that time would seem to have been more difficult to explain away, but viewed from the present-day it is easier to attribute to policy what was then too hastily assumed to be 'graft,' for at the Restoration Jenkins was nearly 80 years of age, and that fact, coupled with his one-time "trop de zèle" for the Royal Cause may well have made that very astute Chancellor (Clarendon) hesitate, before making such an appointment at that particular moment, and as to Glynne, though he had never been over-scrupulous, yet he may be said to have been a Monarchist with limitations, and equally opposed to arbitrary government or anarchy.

such an act after all his suffering, retired to his estate in Glamorganshire, then restored to him after the loss of it, and all he had, for many years. He was a person of great abilities in his profession."

Judge Jenkins had four sons and six daughters, but his issue soon became extinct in the male line. A great-granddaughter married Charles Talbot (1684-1737), Lord Chancellor.

LEX TERRAE

OR

THE LAWS OF THE LAND

By Judge Jenkins

(*from Lord Somers' tracts*)

It is a remarkable example of the veneration in which the people of England hold their established laws and Government that long after the civil sword had been drawn the advocates of each party continued to appeal to those municipal institutions which, in any other Country, would have been silenced by the first clash of arms. And it is no small argument of the courage of Judge Jenkins that being a prisoner and in the power of Parliament he ventured thus boldly to arraign their authority.

Introduction

To the Honourable Societies of Gray's Inn and the rest of the Inns of Court and to all the Professors of the Law.

I have now spent forty-five years in the study of the law of the Land, being my profession, under and by the conduct of which laws this Commonwealth hath flourished for some ages past in great splendour and happiness (jam seges est ubi Troja fuit). The great and full body of this Kingdom hath of late years fallen

into an extreme sickness. It is truly said that the cause of the disease being known, the disease is easily cured. There is none of you, I hope, but doth heartily wish the recovery of our common parent, our native Country (moribus antiquis stat res Britannica). I call God to witness that this discourse of mine hath no other end than my wishes of the common good. How far I have been from ambition my life past, and your own knowledge of me can abundantly inform you—and many of you well know that I ever detested Ship money and monopolies and that in the beginning of this Parliament for opposing the excesses of one of the Bishops I lay under three excommunications, and the examination of seventy-seven articles in the High Commission Court. His sacred Majesty (God is my witness) made me a Judge in parts of Wales against my will and a Patent for my place was sent me for the which I have not paid one farthing. The place is of so inconsiderable a benefit that it is worth £80 per annum when paid and it cost me every year I served twice as much out of my own estate in the way of ordinary and frugal expense of travelling. That which gave me comfort was that I knew well that His Majesty was a just and provident Prince.

In the time of the Attorneyships of Noy and others they were pleased to make often use of me, and many references concerning suits at Court upon occasion came to my knowledge and as I shall answer to God upon my last account this is truth, that all, or most of the references which I have seen in that kind (and

I have seen many) were to this effect—That His Majesty would be informed by his Counsel if the suits preferred were agreeable to the laws and not inconvenient to his people before he would pass them. What could a just and pious Prince do more ?

Gentlemen you shall find the cause and cure of the present great distemper in this Discourse, and God prosper it in your hands, thoughts, and words as the case deserves. Hold to the Laws, this great Body recovers, forsake them—it will certainly perish—I have resolved to tender myself a sacrifice for them as cheerfully and I hope, by God's assistance, as constantly as old Eleazer did for the holy laws of his Nation.

Your well wisher
DAVID JENKINS,
now prisoner in the Tower.

The law of this land hath three grounds. First, custom, secondly, judicial records, thirdly—acts of Parliament. The two latter are but declarations of the Common Law and custom of the Realm touching Royal Government, and the law of royal Government is a law fundamental.

The government of this Kingdom by a royal sovereign hath been as ancient as history is, or the memorial of any time. What power this Sovereignty always had and used in war and peace in this land is the scope of this discourse. That usage so practised makes therein a fundamental law, and the common law of the land is common usage.

For the first of our Kings sithence the Norman Conquest, the first William, second William, Henry I, Stephen, Henry II and Richard I, the customs of the Realm touching royal government were never questioned. The said Kings enjoyed them in full measure. In King John's time the nobles and commons of the realm conceiving that the ancient customs and rights were violated, and thereupon pressing the said King to allow them, in the seventeenth of King John, the said liberties were by King John allowed and by his son Henry III after, in the ninth year of his reign, confirmed, and are called Magna Charta and Charta de Foresta, declared four hundred and twenty-two years sithence by the said Charters.

Now rests to be considered, after the subjects had obtained their rights and liberties, which were no other than their ancient customs (and the fundamental rights of the King as Sovereign are no other) how the rights of sovereignty continued in practice from Henry the third's time until this present Parliament of the 3rd November 1640, for before Henry the third's time the Sovereignty had a very full power. Bracton (temp Henry III) shews where the supreme power is :—

> Rex habet potestam et jurisdictionem super omnes qui in regno sunt. Omnis sub rege, et ipse sub nullo nisi tantum Deo. Rex non habet superiorem nisi Deum.

Treasons, felonies and pleas of the Crown are propriæ causa regis.

That learned author in these passages shews what the custom was for the power of Sovereignty before that time, the power of the militia, of coining of money, of making leagues with foreign princes, the power of pardoning, of making officers, etc. All Kings had them : The said powers have no beginning.

*By Sexto Ed. I. Liege homage every subject owes to the King, viz., faith de membro, de vita, de terreno honore. The form of oath, inter vetera statuta is down. We read of no such, or any homage made to the two Houses, but frequently of such made by them.

*By 7 Ed. I. It is declared by the Prelates, Earls, Barons and Commonalty of the Realm that it belongeth to the King and his Royal Seigniory straitly to defend force of armour, and all other force against the King's peace, at all times when it shall please him and to punish them that shall do contrary, according to the law and usage of the Realm and hereunto they are bound to aid their sovereign Lord, at all seasons when need shall be. Here the supreme Power in the time of Parliament by both Houses, is declared to belong to the King.

At the beginning of every Parliament all arms are or ought to be forbidden to be borne in London, Westminster or the suburbs. This condemns the multitudes coming to Westminster and the guards of armed men.

All who held by Knight's service and had £20 per

* The authorities are inserted throughout as printed in the originals, but there appear to be errors in some of the references.—EDITOR.

annum were distrainable ad arma militaria suscipienda. This agrees with the records of ancient time continued constantly in all Kings' times, but at this Parliament of 3 Nov. 1640 the King out of his grace discharges this duty, which proves that the power of war and preparation thereto belongs not to the two Houses but only to the King.

The two Spencers in Ed. II's time hatched (to cover their treason) the damnable opinion, viz. that liegeance was more by reason of the King's politic capacity than of his person upon which they inferred these execrable and detestable consequences: First—if the King demeaned not himself by reason in the right of his Crown his lieges are bound by oath to remove him; Secondly, seeing the King could not be removed by suit of law, it was to be done by force. Thirdly—that his lieges be bound to govern in default of him—all of which tenets were condemned by two Parliaments, the one called Exilium Hugonis in Ed. II's time; the other by 1 Ed. III cap. 2. All which articles against the Spencers are confirmed by this last statute. The articles are extant in the book called Vetera Statuta. The separation of the King's person from his power is the principal article condemned, and yet all these three execrable consequents are the grounds and principles whereupon this present time relies and the two Houses found their cause.

The villein of a Lord, in the presence of the King, cannot be seized. This shews what reverence the law gives to the person of a King (Plowden Com.).

Reges, sacro oleo uncti, sunt capaces spiritualis

jurisdictionis, but the two Houses were never held capable of that power. 33 Ed. III.

Rex est persona mixta cum sacerdote, habet ecclesiasticam et spiritualem jurisdictionem—Fitz. 10. This shews the King's power in ecclesiastical causes.

The lands of the King are called in law, patrimonium sacrum. C. sur. Littl: The Houses should not have meddled with that sacred patrimony.

The King hath no Peer in his land and cannot be judged. 3 Ed. III, ergo—the two Houses are not above him.

The Parliament 15 Ed. III was repealed for that it was against the King's laws and prerogative (4 Pars. Inst. fo. 52). This shews clearly the propositions sent to Newcastle ought not to have been presented to his Majesty for that they are contrary to the laws and his prerogative.

The Lords and Commons cannot assent in Parliament to anything that tends to the disinherison of the King and his Crown to which they are sworn (Coke's Institutes, fol. 14.) This condemns the said propositions likewise.

To depose the King, to imprison him, until he assent to certain demands. A war to alter the religion established by law, or any other law, or to remove Councillors, to hold a Castle or Fort against the King, are offences against that law, declared to be treason by the resolutions hereinafter mentioned. (25 Ed.) By that law men are bound to aid the King when war is levied against him in his realm. King, in this Statute, must be intended in his natural body and per-

son that can only die : for to compass his death and declare it by overt act, is declared thereby treason. To encounter in fight such as come to aid the King in his wars, is treason.

Compassing of the Queen's death, of the King's eldest son ; to coin his money, to counterfeit his Great Seal, to levy war against him, to adhere to such as shall so do, are declared by that act to be High Treason. This Statute cannot refer to the King in his politic capacity, but to his natural, which is inseparable from the politic : for a body politic can have neither wife nor child, nor levy war, nor do any act but by the operation of the natural body. A corporation, or body politic, hath no soul or life but is a fiction of the law, and the Statute meant not fictitious persons but the body natural conjoined with the public, which are inseparable.

The clause in that Act that no man should sue for grace or pardon for any offence condemned, or forfeiture given by that act, was repealed by a subsequent act in 21 Rich. II holden unreasonable, without example and against the law and custom of the Parliament. This condemns the proposition for disabling the King to pardon—4 Pars. Inst. fol. 42. The act of 11 Rich. II so much urged by the other side was an act to which the King consented—and so a perfect act—yet note the army then about the town—note that that law is against private persons and by the 3 Cap thereof the reasons there declared are declared to be new treasons made by that act and not to be drawn to example. It was abrogated 21 Rich. II

and revised by an Usurper Henry IV to please the people, and by the 10th Chap. (I Hen. IV) thereof enacts that nothing shall be treason but what is declared by 25 Ed.

The regality of the Crown of England is immediately subject to God and to none other. Plain words shewing where the supreme power is.

The commission of array is in force and no other Commission (Rot. Parl. 5 Henry IV, Numb. 24)—an act not printed. This act was repealed by 4 and 5 P. & M. cap. 2 : this repealed by the act 1 Jacobi, and so it is of force at this day—for the repealing statute is repealed—4 Pars Instit. fol. 51 & 125—published sithence this Parliament by the desire of the House of Commons. Their order is printed in the last leaf of the Commentaries upon Magna Charta.

Sir Edward Coke, by their party, is holden for the oracle of the law, who wrote the said fourth part in a calm and quiet time and, I may say, when there was no need to defend the authority of the Commission of Array.

For that objection that the Commission leaves power to the Commissioners to tax men secundum facultates and so make all men's estates arbitrary, the answer is, that in levying of public aids upon men's goods and estates, which are variable, and probably cannot be certainly known by any but the owners, it is impossible to avoid discretion in the assessments, for so it ever was, and ever will be. By this appears that the votes of the two Houses against the Commission of array were against the law.

The death of the King dissolves the Parliament. If 'King' should refer to the politic capacity, it would continue after his death, 4 Pars. Inst. 46—which proves that the King cannot be said to be there when he is absent as now he is : there is no interregnum in the Kingdom. The dissolution of the Parliament by his death shews that the beginning and end thereof refers to the natural person of the King, and therefore he may lawfully refuse the propositions.

The second of Henry V, chap. 6. To the King only it belongs to make leagues with foreign princes —this shews again where the supreme power is. The 8 Hen. VI—numb. 75 Rot. Parl. Coke's 4 Pars. Inst. 25, no privilege of Parliament is grantable for treason, felony or breach of the peace. If not to one member, not to two—not to ten, not to the major part. 19 Hen. VI 62. The law is the inheritance of the King and his people by which they are ruled—King and People, and the people are by the law bound to aid the King : and the King hath an inheritance to hold parliaments and in the aids granted to the commonalty. If the major part of a Parliament commit treason, they must not be judges of it, for no man or body can be judge in his own cause, and as well as ten or any number may commit treason, the greater number may as well.

The King by his letters Patents may constitute a County Palatine and grant regal rights. 32 H. 6, 13 Plowden 334. This shews where the supreme power is.

The same persons must not be judge and party.

A corporate Body can commit no treason, nor can treason be committed against a corporate Body (21 Ed. IV 13 & 14, Calvin's case 7 Pars., fo. 11, 12), but the persons of the men who make that body may commit treason, and commit it against the natural person of him who, to some purposes, is a Body corporate : but quatenus corporate, no treason can be committed by or against such a Body : that Body hath no soul, no life, and subsists only by the fiction of the law and for that reason the law doth conclude as aforesaid. Therefore the Statute 25 Ed. must be intended of the King's natural person, conjoined the politic, which are inseparable, and the King's natural person being at Holmby (he being a prisoner of Parliament there) his politic person is there also and not at Westminster, for the politic and the natural make one body indivisible.

If all the people of England should break the league made with a foreign prince without the King's consent the league holds and is not broken and therefore the representative body is inferior to his Majesty's (19 & 22 Ed. IV).

The King may erect a Court of Common Pleas, in what part of the Kingdom he pleases by his letters patents. Can the two Houses do the like ?

By 1 Ed. IV it cannot be said that the King doth wrong, declared by all the Judges and Sergeants at law then there. The reason is nothing can be done in this Commonwealth by the King's grant, or any other act of his, as to the subjects, persons, goods, lands or liberties but must be according to the estab-

lished laws, which the Judges are sworn to observe and deliver between the King and his people impartially to rich and poor, high and low; and therefore the Justices and the Ministers of Justice are to be questioned and punished if the laws be violated, and no reflection to be made on the King. All Councillors and Judges for a year and three months, until these tumults began in Parliament were left to the ordinary course of justice. What hath been done sithence is notorious.

For great causes and considerations an act of Parliament was made for the surety of the King's person (1 Rich. III). If a Parliament were so tender of King Richard III the Houses have greater reason to care for the preservation of his Majesty.

By 2 Henry VII cap. 1, the subjects are bound by their allegiance to serve the King for the time being against every rebellion, might and power reared against him within this land. That it is against all laws, reason and good conscience if the King should happen to be vanquished that for the said deed and true duty and allegiance they should suffer in anything: it is ordained that they should not: and all acts of process of law hereafter to be made to the contrary are to be void. This law is to be understood of the natural person of the King for his politic capacity cannot be vanquished, nor war reared against it. Relapsers are to have no benefit of this Act. By 12 Henry VII 20, 24 & 25, Henry 8-12 & 21. It is no statute if the King assent not to it, and he may dissent. This proves the negative voice.

The King hath full power, in all causes, to do justice to all men. This is affirmed of the King and not of the two Houses. The Commons in Parliament acknowledge no superior to the King under God : the House of Commons confess the King is above the representative body of the realm.

Of good right and equity the whole and sole power of pardoning treasons, felonies, etc., belong to the King as also to make all Justices of Oyer and Terminer, Judges, Justices of the Peace, etc. (27 Hen. VIII c. 24). This law condemns the practice of both Houses at this time.

The King's royal assent to any act of Parliament signed with his hand, expressed in his letters patents under the Great Seal, and declared to the Lords and Commons shall be as effectual as if he assented in his own person. A vain act if the King be virtually in the two Houses (33 Hen. VIII c. 21).

The King is the Head of the Parliament, the Lords the principal members of the Body, the Commons the inferior members, and so the Body is composed (Dier 38 H. VIII), therefore there is no more Parliament without a King than there is a Body without a Head.

There is a Corporation by the common law, as the King, Lords and Commons are a Corporation in Parliament (14 Hen. VIII fo. 3) and therefore they are no Body without the King. The death of the King dischargeth all mainprise to appear in any Court or to keep the peace (24 Ed. III 48–1 Ed. IV 2, 2 Hen. IV 8).

The death of the King dischargeth all mainprise and discontinues all pleas by the common law (1 Hen. VII 10, 1 Ed. V 1–1 Ed. VI 7), which agreeth not with the virtual power insisted upon now.

Writs are discontinued by the death of the King—patents of Judges, commissions for justices of the peace, sheriffs, escheators determined by his death (1 Ed. VI c. 7). Where is the virtual power? All authority and jurisdiction, spiritual and temporal, is derived from the King (1 Ed. VI 7), therefore none from the Houses.

His Majesty's subjects, according to their bounden duties ought to serve the King in his wars on this side, or beyond the seas. By over the seas is to be understood for wages (2 & 3 Ed. VI 2) (11 Henry VII c. 1, Calvin's case) this proves the power of wars, and preparation for war to be in the King.

It is most necessary both for common policy and duty of the subject to restrain all manner of shameful slanders against their King, which, when they be heard, cannot but be odious to his true and loving subjects, upon whom dependeth the whole unity and universal weal of the realm (Coke Pars. 5 Ed. VI cap. 11). This condemns their continuing of the weekly pamphlets which have been so foul mouthed against his Majesty.

The punishment of all offenders against the laws belongs to the King, and all jurisdictions do, and of right ought to belong to the King. This leaves all to his Majesty (1 Mary Queen c. 2).

All commissions to levy men for the War are

awarded by the King. The power of war only belongs to the King 4-5 P. & M. c. 8. 10 Eliz. Pl. 315.

It belongs to the King to defend his people and to provide arms and force. No speech of the two Houses. " Roy ad sole government de ses subjects." " Corps naturel le Roy et politique sunt un corps " : Plow. 234, Calvin's case.

God's law and man's law cannot be forfeited or renounced by any means—it is inseparable from the person.

Every member of the House of Commons, at every Parliament takes a corporal oath, that the King is supreme and only Governor in all causes, in all his Dominions ; otherwise he is no member of that House. The words of the law are—in all causes, over all persons—1 Eliz. c. 1—Cawdrie's Case 5 pars. fol. 1. This Act of Eliz. is but declarative of the ancient law.

The Earl of Essex and others assembled multitudes of men to remove Councillors—adjudged treason by all the judges of England. (43 Eliz. 3 Pars. Inst. fol. c. 2.)

To depose the King, or take him by force : to imprison him until he hath yielded to certain demands, adjudged treason, and adjudged accordingly in the Lord Cobham's case. (39 Eliz. 1.)

A rising to alter religion established, or any law is treason : so for taking the King's castles, forts, ports or shipping—Brooke treason 24. 3 & 4 Philip & Mary—Dier—Strafford's case concerning Scarborough.

The law makes not the servant greater than the master, nor the subject greater than the King, for that were to subvert order and measure.

The law is not known but by usage, and usage proves the law (10 Eliz.) and how usage hath been, is notoriously known.

The King is our only rightful and lawful liege Lord and Sovereign (1 Jac. 1.) "We do upon the knees of our hearts agnise constant faith, loyalty, and obedience to the King and his royal progeny, in this High Court of Parliament where all the body of the realm is either in person or by representation. We do acknowledge that the true and sincere religion of the Church is continued and established by the King, and do recognise as we are bound by the law of God and man, the realm of England and the imperial Crown thereof doth belong to him by inherent birthright, and lawful and undoubted succession; and submit ourselves and our posterities for ever until the last drop of our blood be spent to his rule; and beseech the King to accept the same as the first fruits of our loyalty and faith to his Majesty and his posterity for ever; and for that this act is not complete nor perfect without his Majesty's assent; the same is humbly desired." This proves that the Houses are not above the King, that Kings have not their titles to the Crown by the two Houses but by inherent birthright, and that there can be no statute without his express assent, and destroys the chimera of the King's virtual being in the Houses.

By 3 Jac. 4 to promise obedience to the Pope,

or any other State, Prince or Potentate other than the King his heirs and successors, is treason, and therefore those persons who call the Houses—the Estates—offend this law.

Such bills as His Majesty is bound in conscience and justice to pass are no law without his assent. (Coll. of Ordinances.) To design the ruin of the King's person, or of monarchy is a monstrous and injurious charge.

Ubi lex non distinguit, non est distinguendum : all the aforesaid acts and laws do evidently prove the militia to belong to the King—that the King is not virtually in the two Houses—that the King is not to be considered separately in relation to his politic capacity—that the King is not a person trusted with a power, but that it is his inherent birthright from God, nature and law and that he hath not his power from the people. These laws have none of those distinctions of natural and politic—abstractum et concretum—power and person. In Caesar's time this Island had Kings, and ever since which is about 1700 years ago.

No King can be named, in any time, made in this Kingdom by the people. A Parliament never made a King, for they were Kings before. The Parliaments are summoned by the King's Writ.

The King is principium, caput et finis parliamenti. The Body makes not the Head, nor that which is posterior that which is prior. Concilium non est praeceptum, conciliarii non sunt praeceptores.

For Council to compel a consent hath not been

heard of to this time in any age, and the House of Commons, by the writ are not called ad concilium. The writs to the 12 Judges, King's Counsel, twelve Masters of the Chancery are consilium impensuri and so of the Peers : the writs for the commonalty—ad faciendum et consentiendum—which shows what power the representative body hath ; they have not power to give an oath—neither do they claim it. The King at all times when there is no Parliament, and in Parliament, is assisted with the advice of the Judges of the law, twelve in number (for England at least hath two sergeants when fewest) an attorney and a solicitor (General), twelve masters of the Chancery, his council of state, consisting of some great prelates, and other great personages versed in State affairs, when they are fewest to the number of twelve. All these persons are always of great substance, which is not preserved but by the keeping of the law. The prelates versed in divine law, the other grandees in affairs of state and managery of Government, the Judges, King's sergeants, attorney, solicitor and masters of the Chancery versed in the law and custom of the realm. All sworn to serve the King and his people justly and truly. The King is also sworn to observe the laws ; and the judges have in their oath a clause that they shall do common right to the King's people, according to the stablished laws, notwithstanding any command of the King to the contrary under the great seal or otherwise. The people are safe by the laws in force without any new. The law, finding the Kings of this realm assisted by

so many great men of conscience, honour, and skill in the rule of commonwealth, knowledge of the laws and bound by the high and holy bond of an oath upon the Evangelists, settles, among other powers upon the King a power to refuse any bill agreed upon by both Houses, and power to pardon all offences, to pass any grants in his minority (there are many great persons living who hold many a thousand pound a year by patents from Edward the Sixth, passed when he was but ten years of age) not to be bound to any law to his prejudice, whereby he doth not bind himself, power of war and peace, coining of money, making all offices, etc. The law, for the reasons aforesaid, hath approved these powers to be unquestionable in the King, and all Kings have enjoyed them till the 3rd November, 1640.

It will be said notwithstanding all this fence about the laws, that the laws have been violated and therefore the said powers must not hold and that the two Houses will remedy this. The answer to this is evident. There is no time past, nor time present, nor will there be time to come, so long as men manage the law, but the laws will be broken more or less, as appears by the story of every age. All the pretended violations of this time were remedied by acts to which the King consented before his departure, 10th January, 1642, being then driven away by tumults. And the Houses for a year and almost three months, from 3rd November, 1640 to 10th January, 1642 as aforesaid had time and liberty to question all those

persons who were either causes or instruments of the violation of any of the laws.

Examine how both Houses remedied them in former times. First touching religion. What hath been done this way? Both Houses in Hen. VIII's time, tendered to him a Bill to be passed, called commonly the Bill of the Six Articles. This was conceived by them to be a just and necessary bill. Had not Henry VIII done well to have refused the passing of this Bill? Both Houses tendered a Bill to him to take the reading of the Scriptures from most of the Laity. Had not King Henry the Eighth deserved much praise to reject this Bill? In Queen Mary's time both Houses exhibited a Bill to her to introduce the Pope's power and the Roman religion. Had not Queen Mary done well to have refused this Bill? Many such instances may be given. The two Houses, now at Westminster, I am sure, will not deny but the refusal of such Bills had been just, the King being assisted, as aforesaid—and why not so in these times?

For the civil government, what a Bill did both Houses present to Richard the Third to make good his title to the Crown. Had it not been a great honour to him to have rejected it? What Bills were exhibited to Henry VIII by both Houses for the bastardizing of his daughter Elizabeth, a queen of renowned memory, to settle the Crown of this realm, for default of issue of his body, upon such persons as he should declare by his Letters Patents, or his last Will, and many more of the like. Had not this

refusal of passing such Bills magnified his virtue and rendered him to posterity in a different character from what he now hath ?

And by the experience of all times, and the consideration of human frailty, this conclusion is manifestly deduced, that it is not possible to keep men at all times (be they the Houses, or the King and his Council) but there will be sometimes some deviation from the laws, and therefore the constant and certain powers fixed by the ancient law must not be made void. The laws do punish where the law is transgressed and the King's ministers only ought to suffer for the same.

In this Parliament the Houses exhibited a Bill to take away the suffrages of Bishops in the upper House of Parliament, and have sithence agreed there shall be no more Bishops at all. Might not the King, if he had so pleased, have answered this Bill with "le Roy s'avisera" or "ne veult" : (It was against Magna Charta, Articuli Cleri, and many other Acts of Parliament) and might have farther given these reasons for the same had it so pleased him.— First, that this Bill destroys the writ whereby they are made two Houses of Parliament—the King in the writ to the Lords being cum praelatis colloquium habere : secondly, they have been in all Parliaments since we had any, and voted, but in such wherein they themselves were concerned ; and there have been Bishops here ever since we were Christians, and the fundamental law of the Kingdom approves of them. If any of them were conceived offensive, they were left

to justice, and His Majesty would put in inoffensive men in their places. But sithence His Majesty hath passed the Bill for taking away their votes in Parliament, it is a law that binds us so far.

Upon the whole matter the law hath notably determined that Bills agreed to by both Houses, pretended to be for the public good, are to be judged by the King, for in all Kings' reigns Bills have been preferred by both Houses, which always are pretended to be for the public good, and many times are not, and were rejected with " Roy s'avisera " or " ne veult."

This Parliament began on the 3rd Nov., 1640. Before that time in all this King's reign, no armed power did force any of the people to do anything against the law. What was done was by his Judges, officers, referees and ministers. From that time until the 10th January, 1642 (when the King went from London to avoid the danger of frequent tumults as before stated) Privy Councillors and all his Justices and Ministers were left to the justice of the law. There wanted no time to punish punishable men. The Sphaere of the House of Commons is to represent the grievances of the Country, to grant aids for the King upon all fit occasions extraordinary, to assent to the making or abrogating of laws ; the orb of the House of Lords to reform erroneous judgments given in the King's Bench, to redress the delays of Courts of Justice, to receive all petitions, to advise His Majesty with their counsel, to have their votes in making or abrogating of laws, and to propose for

the common good what they conceive meet. Lex non cogit ad impossibilia. And subjects are not to expect from kings impossible things.

The King is virtually in his ordinary Courts of justice, so long as they continue his Courts. Their charge is to administer the laws in being, and not to delay, defer or sell justice for any commandment of the King. We have laws enough, instrumenta boni saeculi sunt boni viri : good ministers, as judges and officers, are many times wanting. The Houses propose new laws, or abrogation of the old. Both induce novelty. The law, for the reasons aforesaid, makes the King the only judge, who is assisted therein by a great number of grave, learned, and prudent men. For the considerations aforesaid, the King's party adhered to him. The law of the land is their birthright and their guide ; no offence is committed where that is not violated. They found the commission of array warranted by the law ; they found the King in this Parliament to have quitted the Ship-money, Knighthood money, seven courts of justice, consented to a triennial Parliament, settled the Forest bounds, took away the clerk of the market of the Household, trusted the House with the Navy—passed an act not to dissolve this Parliament without the Houses assent. No people in the world so free, if they could have been content with laws, oaths and reason, and nothing more could or can be devised to secure us, neither hath been in any time.

Notwithstanding all this, we found the King driven from London by frequent tumults, that two-

thirds and more of the Lords had deserted that House for the same cause ; and the greater part of the House of Commons left that House also for the same reason ; new men chosen in their places, against law, by the pretended warrant of a counterfeit seal ; and in the King's name, against his consent, levying war against him and seizing his ports, forts, magazines and revenue, and converting them to his destruction and the subversion of the law of the land, levying taxes upon the people never heard of before in this land, devised new oaths to oppose forces raised by the King not to adhere to him, but to them, in this war, which they call the negative oath and the vow and covenant.

By several ways never used in this kingdom they have raised moneys to foment this war and especially to enrich some among them, namely, excise, contributions, sequestrations, fifth parts, twentieth parts, meal money, sale of plundered goods, loans, benevolences, collections upon their fast days—new impositions upon merchandises, guards maintained upon the charge of private individuals, fifty subsidies at one time, compositions with such as they call delinquents, and sale of Bishops lands, etc.

From the King's party means of subsistence are taken and before indictment their lands are seized and their goods taken. The law allows a traitor or felon attained "necessaria sibi et familiae suae in victu et vestitu"—Where is the covenant ? Where is the Petition of Right ? Where the liberty of the subject ?

We have aided the King in this war contrary to

the negative oath and other votes. Our warrant is the 25 Ed., the second chapter and the said resolutions of all the judges.

We have maintained the commission of array by the King's command contrary to their votes. We are warranted by the Statute of the 5 Henry IV, and by the judgment of Sir Edward Coke, the oracle of the law, as they call him.

We maintained Archbishops and Bishops whom they would suppress. Our warrant is Magna Charta and many Statutes more.

We have maintained the Book of Common Prayer —they suppress it. Our warrant is five Acts of Parliament in Ed. VI. and Elizabeth's time 5 Peschae —35 Elizabeth inter placita coronæ in Banco Regis, New Booke of Entries fo. 252. Penry, for publishing two scandalous libels against the church government was indicted, arraigned, attainted, and executed at Tyburn.

We maintained the militia of the Kingdom to belong to the King—they the contrary. Our warrant is the Statute of the 7th of Edward I, and many statutes sithence, the practice of all times, and the custom of the realm.

We maintained the counterfeiting of the Great Seal to be High Treason, and so of the usurpation of the King's forts, ports, shipping, castles and his revenue and the coining of money, against them. We have our warrant by the said statute of the 25 Ed. chapter the second, and divers others since, and the practice of all times.

We maintain that the King is the only supreme Governor in all causes; they—that His Majesty is to be governed by them. Our warrant is the Statute of the first of Queen Eliz. cap. 1, and the fifth of Queen Elizabeth, the first.

We maintain that the King is King by an inherent birthright, by nature, by God's law, and by the law of the land—they say his kingly right is an office upon trust. Our warrant is the Statute of the first of King James, cap. 1, and the resolution of all the judges in England in Calvin's case.

We maintain that the politic capacity is not to be severed from the natural—they hold the contrary. Our warrant is in two Statutes (viz. Exilium Hugonis in Ed. the second's time and the first of Ed. III, cap. 2) and their oracle (Coke) who hath published it to posterity, that it is damnable, detestable, and execrable treason (Calvin's case pars. 7, fo. 1).

We maintain that he who aids the King at home or abroad ought not to be molested or questioned for the same—they hold and practise the contrary. Our warrant is the Statute of the eleventh of Henry VII (1).

We maintain that the King hath power to disassent to any Bill agreed by the two Houses—which they deny. Our warrant is the Statute of the second of Henry the fifth, and the practice of all times, the first of King Charles cap. 7, the first of King James, cap. 1.

We maintain that the Parliaments ought to be holden in a grave and peaceable manner without tumults—they allowed multitudes of the meanest

sorts of people to come to Westminster, to cry for justice, when they could not have their will, and keep guards of armed men to wait upon them. Our warrant is the Statute of the seventh of Ed. the second, and their Oracle (Coke).

We maintain that there is no State within this Kingdom but the King's Majesty, and that to adhere to any other State within this Kingdom is High Treason. Our warrant is the third of James I c. 4, and the 23rd of Queen Eliz. c. 1.

We maintain that to levy war, to remove Councillors, to alter religion, or any law established is High Treason—they hold the contrary. Our warrant is the resolutions of all the Judges of England in Queen Elizabeth's time, and their Oracle (Coke) agrees with the same.

We maintain that no man should be imprisoned or put out of his lands, but by due course of law, and that no man ought to be adjudged to death but by the law established, the customs of the realm, or by act of Parliament. They practise the contrary in London, Bristol, Kent, etc. Our warrant is Magna Charta c. 29, the Petition of Right (the third of King Charles) and divers laws there mentioned.

We of the King's Party did and do detest monopolies and ship money and all the grievances of the people as much as any men living. We do well know that our Estates, lives, and fortunes are preserved by the laws, and that the King is bound by his laws. We love Parliaments. If the King's Council, Judges or Ministers have done amiss Parliament had from

the 3rd Nov. 1640 to 10 Jany. 1642 time to punish them, they being all left to justice. Where is the King's fault? The law saith the King can do no wrong, that he is medicus regni, pater patriae, sponsus regni, qui per annulum is espoused to his Realm at his coronation. The King is God's lieutenant, and is not able to do an unjust thing. These are the words of the law.

One great matter is pretended, that the people are not sure to enjoy the acts passed this Parliament—a succeeding Parliament may repeal them—The objection is very weak. A Parliament succeeding to that, may repeal that repealing Parliament. That fear is endless and remedyless, for it is the essence of Parliaments being complete as they ought to be, of head, and all the members. Parliaments are as the times are. If a turbulent faction prevails, the Parliaments are wicked, as appears by the examples recited before of extreme wicked Parliaments. If the times be sober and modest, prudent and not biassed, the Parliaments are right, good, and honourable, and they are good medicines and salves, but in this Parliament excessit medicina modum.

In this cause and war between the King's Majesty and the two Houses at Westminster what guide had the subjects of the land to direct them, but the laws? What means could they use to discern what to follow, what to avoid, but the laws? The King declares it treason to adhere to the Houses in this War—the Houses equally declare it treason to adhere to the King. The subjects, for a great and considerable

part of them (treason being such a crime as forfeits life and estate and renders a man's posterity base, beggarly and infamous) look upon the laws, and find the letter of the law requires them to assist the King as before is manifested. Was ever subject criminally punished, in any age or nation, for his pursuit of what the letter of the law commands !

The subjects of the Kingdom find the distinction and interpretation now put upon the laws of abstractum and concretum, power and person, body politic and natural, personal presence and virtual, all to have been condemned by the law. And so the King's party hath both the letter of the law and the interpretation of the letter cleared to their judgments, whereby they might evidently perceive what side to adhere to. What satisfaction could modest, peaceable and loyal men more desire ?

A verbis legis in criminibus et poenis non est recedendum hath been an approved maxim of law in all ages and times. If the King be King and remain in his kingly office (as they call it) then all the said laws are against them without colour. They say the said laws relate to him in his office—they cannot say otherwise. Commissions and pardon in the King's name, and the person of the King and his body politic cannot, nor ought to be severed, as hath been before declared. And the members of both Houses have sworn constantly in this Parliament that the King is the only supreme governor in all causes over all persons at this present time.

For that of verbal or personal commands of the

King, which is objected, we affirm few things to be subject thereto by the law, but his Majesty's command under his Great Seal which in the War hath been used by the King's command, for his commission to levy and array men, that is no personal command (which the law in some cases disallows), but that is such a command, so made, as all men hold their lands by, who hold by patents; all corporations have their charters, which hold by charters, and all Judges and officers their places and callings.

It is objected that the King cannot suppress his Courts of justice and that this war tended to their suppression. The answer is, the King cannot, nor ought to suppress justice, or his Courts of Justice, nor ever did. But Courts of Justice by abuser or non-user, cease to be Courts of Justice. When Judges are made and proceedings in those courts holden by others than Judges made by the King, and against his command under the Great Seal, and His Majesty is not obeyed, but only the votes of the Houses, they cease to be the King's Courts and are become the Courts of the two Houses : and his Judges breaking that condition in law, of trust and loyalty, implied in their patents, are no longer his Judges. They obey and exercise their places by virtue of writs and processes under a counterfeit seal. The King only can make Judges. 27 Hen. VIII 24. The Chief Justice of the King's Bench is made by the King's Writ only, of all the Judges, otherwise the King's patent makes judges.

The Great Seal is the Key of the Kingdom and

meet it is that the King should have the key of his Kingdom about him, which confutes their saying that the King got the seal away surreptitiously.

The King, and he only, may remove his Courts from Westminster into some other place. At York the terms were kept for seven years in Ed. the first's time. But for the Court of Common Pleas the place must be certain. For the King's Bench and the Chancery, the King by the law may command them to attend his person always, if it seem so meet to him, but not so the Common Pleas which must be to a place certain, and so notified to the people, all of which the two Houses have violated—Plebs sine lege ruit.

David Jenkins,
Prisoner in the Tower.

SOME SEEMING OBJECTIONS

OF MASTER PRYNNE'S SCATTERED IN DIVERS BOOKS, ANSWERED, AND THE TRUTH THEREBY MORE FULLY CLEARED.

Objection.

1. The first of Henry the fourth reviveth the Statute of the eleventh of Rich. II and repeals the 12th of Rich. II whereby certain persons were declared traitors to the King and Kingdom, being of the King's party.

Answer.

1. True :—but note the 11th of Rich. II, a Parliament beset with forty thousand men, and the King assents to it—so an Act : and besides the first of Hen. IV declared that the treasons mentioned in the Act of the eleventh of Rich. II being but against a few private men, shall not be drawn into example, and that no treason should be, but such as the 25th of Ed. declares. All these are Acts passed by a King and the three Estates, not to be drawn into example, in a tumultuous time, by a besieged Parliament with an army. And the confirmer of Hen. IV being an Usurper, makes that Act

Objection.

Answer.

of the first of Hen. IV to secure himself. Also what is this in the votes of the two Houses only at this time?

2. The Court of Parliament is above the King, for it may avoid his Charters, commissions, etc., granted against the law. And the law is above the King.

2. By the same reasoning you may say that the Courts of Chancery, or any of the Courts of law at Westminster are above the King, for they make of no effect the King's Charters which are passed against the law: and the King is subject to law and sworn to maintain it. Again, it is no Parliament without the King, and the King is the head thereof. He is principium caput et finis of a Parliament as Modus Tenendi Parliamenti hath it, and it is a sorry Parliament that wants all these; and therefore to say that Parliaments are above the King is to say that the King is above himself.

3. The Parliament can enlarge the King's pre-

3. If the King assent—otherwise not—and then it

Objection.	*Answer.*
rogative, therefore it is above him.	is an act of Parliament and otherwise no Act.
4. Bracton saith God, the law and the King's Court (viz.) his Earls and Barons are above the King (viz.) in Parliament.	4. Where is then the House of Commons? Indeed take God, the Law, and Earls and Barons together it is true—but to affirm that the Earls and Barons in Parliament are above the King (the King being the Head of the Parliament and they one of the members) how an inferior member is above the head is hard to conceive. Besides that proposition destroys all Mr. Prynne's discourse who attributes so much to the House of Commons.
5. The King is but one of the three Estates of Parliament and two are greater than one.	5. The legs, arms and trunk of the body are greater than the head and yet not above, nor with life, without it. The argument holds for quantity but not for quality: and in truth the King is none of the three Estates but above them all. The

Objection.	*Answer.*
	three Estates are the Lords spiritual, the lords temporal and the Commons. (See Coke their Oracle in his Chapter of Parliaments, fo. 1.)
6. In Corporations the greater number of voices make all the acts of the Corporation valid, therefore so in Parliament.	6. By this reasoning the King's assent is needless, and to no end, and all the Acts of Parliament formerly mentioned, and law books, have quite mistaken the matter which, with unanimous voice, requires the King's assent as necessary. Besides, the Corporations are so constituted by the King's Charters that the greater number of votes shall make their acts valid.
7. The King, as King, is present in his Parliament, as well as in all his other Courts of Justice, howbeit he is not there.	7. In his other Courts of justice he hath no voice—he is none of the judges. In the Parliament he hath—If his presence be not necessary, his voice is not, nor his assent.
8. The original prime legislative power of	8. Master Prynne in the same leaf, affirms, and truly,

Objection.	*Answer.*
making laws, to bind the subjects and their posterity rests not in the King, but in the Kingdom, and Parliament which represents it.	that the King's assent is generally requisite to pass laws and ratify them. The King is the head of the Kingdom and Parliament. How then can a Body act without a Head ?
9. The King cannot alter the Bills presented to him by both Houses.	9. True—but he may refuse them.
10. Acts of Parliament and laws ministered in the reigns of Usurpers bind rightful Kings.	10. What is this to prove the two Houses' power only, which is the question ? A King de facto must be obeyed by them who submitted to him, and they are his subjects by their submission and not subjects, de facto, to the true King, and such being Traitors and rebels (having renounced the true King) when the lawful King is restored may be punished by him for their treason. But here is a King still in both cases and the proceedings at law hold : the Judges having their patents from the

Objection.

Answer.

being Kings in the reigns of Kings de facto or de jure—for all Kings are bound and sworn to observe the laws.

11. A king dies without an heir, is an infant, non compos mentis etc. The two Houses may establish laws.

11. There is no interregnum in England as appears by all our Books of law, and therefore the dying without an heir is a vain supposition and besides, by their principle, he is considered in his politic capacity which cannot die at all. The Protector, assisted by the Counsel of the King at law, his twelve judges, the Council of State, his Attorney and Solicitor General, and two sergeants at law, his twelve masters in Chancery, hath, in the King's behalf and ever had, a negative voice. But what is this to the present question? We have a King of full age, of great wisdom and judgment. The power of the two Houses in such a case to be over the King cannot be shown.

Objection.	*Answer.*
12. The King cannot disassent to public and necessary Bills for the Common good.	12. Nor ever did good Kings. But who shall be judge whether they be public and necessary? The major part in either of the Houses, for passing of bills so pretended, may be but one or two voices, or very few, and perhaps of no judicious men. Is it not then fitter, or more agreeable to reason, that his Majesty and his advisers should judge of the convenience and benefit of such bills for the public good, rather than a minor (of which sort there may be in the Houses) or a weak man, or a few, who oftentimes carry it by making the major part, which involves the consent of all? Let reason determine.
13. The Kings of England have been elective, and the King by his Coronation oath is bound to maintain justas leges et con-	13. Popery hath been in the Kingdom and therefore to continue it still will not be taken for a good argument. When things are settled for many ages, to look back to

Objection.

suetudines quas vulgus elegerit, etc.

Answer.

times of confusion is to destroy all repose. The Act of Parliament of the first of King James cap. 1 and all our extant laws say that the King's office is an heritage inherent in the blood of our Kings and their birthright.

And usurpers who come in by the consent of the people are Kings de facto but not de jure as appears by the Acts of Parliament declaring them so. And by all our law books and the fundamental constitution of the land, regal power is hereditary and not elective.

For the words vulgus elegerit—if vulgus be applied to the House of Commons they of themselves can make no laws. The Peers were never yet termed vulgus, but allowing they be so called, the laws to be made must be just : and who is fit to judge thereof is before made evident. Customs cannot refer to future

Objection.	*Answer.*
	time and both are coupled, laws and customs.
14. Princes have been deposed and may be, by the two Houses.	14. The deposers were traitors, as appears by the resolution of all the Judges of England (Coke, chap. Treason, in the second part of the Institutes). And never was King deposed but in tumultuous and mad times and by the power of armies, and they who were to be the succeeding Kings, at the head of them as Ed. III and Henry IV.
15. The appeal to Parliament for errors in judgments in all Courts is frequent.	15. This is only to the House of Lords and that is not the Parliament. The House of Commons has nothing to do therewith, and in the House of Peers, if a writ of error be brought to reverse any judgment, there is first a petition to the King for the allowance thereof, and the reason of the law in this case is, for that the judges of the land, all of

Objection.

Answer.

them, the King's Council, and twelve masters of the Chancery, assist there, by whose advice erroneous judgments are redressed.

16. The Parliaments have determined the rights of Kings as in Henry the VIth time, and others, and Parliaments have bound the succession of Kings, as appears by the Stat. of the 13th of Queen Elizabeth, chapter the first, and the descent of the Crown is guided rather by a Parliamentary title than by Common Law.

16. If this objection be true, that the Title to the Crown is by Parliament, then we had no usurpers, for they all had Parliaments to back them, yea Richard III—that monster. All our Books of Law say they have the Crown by descent, and the Statutes of the land declare that they have the same by inherent birthright. And the Statute of the 13 Eliz. cap. 1, was made to secure Queen Eliz. against the Queen of Scots, then in the Kingdom, claiming the Crown of England and having many adherents. And that Statute to that end affirms no such power in the two Houses (which is the question) but in Queen Elizabeth and the two Houses, which makes

Objection. *Answer.*

against the pretence of this time.

Master Prynne (fo. 104 of his Book intituled "The Parliament's Supreme Power," etc.) objecting the Statute of the first of Queen Elizabeth, and her own oath, that the King is the only supreme governor of this Realm, answers, that the Parliament is the supreme power, and the King the supreme governor, and yet there he allows him a negative voice, and fo. 107, confesseth the acts of Parliament translated the Crown from the right heirs at common law to others who had no good title. Then the Parliamentary title makes not the King. So powerful is truth, that it escapes from a man unawares. To make a distinction between supreme governor and supreme power is very strange, for who can govern without power?

The King assembles the Parliament by his Writ; ad-

Objection.

Answer.

journs, prorogues and dissolves the Parliament by the law at his pleasure as is evident by constant practice. The House of Commons never sat after an adjournment of the Parliament by the King's command. Where is the supreme power ?

17. The King by his oath is bound to deny no man right, much less the Parliament to agree to all just and necessary laws proposed by them to the King. This is the substance of the discourse against the King's negative voice.

17. The King is so bound as is set down in the objection, but who shall judge whether the Bill proposed be just and necessary ? For all that they do propose are so pretended and carried in either House, sometimes by one or two voices, or some few, as aforesaid, and certainly, as hath been shewn, the King, his Council of State, judges, etc., can better judge of them than two or three, or few more.

Master Prynne, fo. 45, in his Book of the Parliament's interest to nominate Privy Councillors, re-calleth the opinion of the Spencers to

Objection.

Answer.

divide the person of the King from his Crown, a strange opinion, and cites Calvin's case but leaves out the conclusions therein mentioned (fo. 11). Master Prynne saith there, "But let this opinion be what it will, without the King's grace and pardon it will go very far, and two acts of Parliament there mentioned are beyond an opinion." And in his book of opening of the great seal (fo. 17) the Parliament hath no jurisdiction to use the Great Seal for pardons, general or particular. Where is the supreme power?

18. Master Prynne (ibid) saith, the Noblemen and State, the day after the funeral of King Henry III (King Ed. I, his son being in the Holy Land) made a new great seal and Keepers of the

18. A facto ad jus, is no good argument, for that in Ed. I's time, it was no Parliament, for King Henry III was dead which dissolved the Parliament if called in his time, and it could be no Parliament of Ed. I's time, for there was no writ issued

Objection.

same and in Henry the VI's time in the first year of his reign the like was done in Parliament.

Answer.

to summon a Parliament in his name, nor could issue, but under that new seal, as it was so suddenly done after Henry the third's death. King Edward I being then in the Holy Land, it was the first year of his reign, no Parliament was held in either the first or second year, he having been out of the country. The first Parliament was in the third year of his reign, as appears by the printed acts and the making of that Seal was by some Lords then present. What hand had the Commons in it? Concerning the Seal made in Henry the VI's time the Protector was Viceroy, according to the course of law, and so the making of that seal was by the Protector in the King's name, and that Protector Humphrey, Duke of Gloucester, as Protector, in the King's name summoned that Parliament and was Protector

Objection.

Answer.

made by the Lords, and not in Parliament, as appeareth plainly, for that Parliament was in the first of Henry VI, and the first holden in his time, and power given by commission to the said Duke, then Protector, to summon that Parliament—But this present Parliament has made the new counterfeit seal while the King was at Oxford, in his own Kingdom, and not in the Holy Land.

19. Master Prynne also saith that the Parliament is above Magna Charta and that the Parliament hath power to repeal the same when there is cause.

19. This argument supposeth that they have the King's power, which hath appeared formerly they have not. But suppose they had! Magna Charta contains many moral laws, which by the law of the land a Parliament cannot alter. For example, it saith cap. 18, justice shall not be sold, delayed nor denied to any man, but by this argument the Parliament may make law to delay, deny and to sell justice, which surely is a very ill position to maintain.

What they would have, doth now, by the propositions sent to Newcastle to his Majesty, appear, whereby they would have him divest himself, and settle in them all his Kingly power by sea and land, and of themselves to have power without him to lay upon the people of this land what taxes they think meet, to abolish the Common Prayer Book, to abolish Episcopacy and to introduce a Church Government not yet agreed, but such as they shall agree upon.

His Majesty, therefore, finding a prevailing party in both Houses to steer this course, and being chased away with tumults from London, leaves the Houses for these reasons, viz. :

1. Because to alter the Government, for religion is against his Oath.

2. Against their oaths—for every one of them hath sworn in this Parliament that His Majesty is the only supreme Governor in all causes ecclesiastical, and over all persons.

3. Against Magna Charta—salvae suis episcopis omnes libertates suae, confirmed by thirty-two acts of Parliament, and in the two and fortieth of Ed. III, the first chapter enacts that if any Statute be made to the contrary, it shall be holden for none. And so it is for judgments of law in the 25 Ed. The Great Charter is declared to be the common law of the land.

4. They endeavour to take away, by their propositions, the government of Bishops, which is as ancient as Christianity in this land, and the Book of Common Prayer, settled by five acts of Parliament,

and compiled by the Reformers and Martyrs, and practised in the time of four Princes.

5. These propositions seeking to take away from His Majesty all his power by land and sea, rob him of that which all his ancestors, Kings of this Realm, have enjoyed. That enjoyment and usage make the law, and a right by the same to His Majesty. They are against their own protestation made in this Parliament, viz. :—to maintain his royal person, honour and estate. They are against their covenant which doth say that they will not diminish his just power and greatness.

For these reasons His Majesty hath left them, and, as is believed, will refuse to agree to the said propositions, as by the fundamental law of the land, he may, having a negative voice to any bills proposed.

The result of all is, upon the whole matter, that the King thus leaving of the Houses, and his denial to pass the said propositions, are so far from making him a Tyrant, or not in a condition to govern at the present, that thereby he is rendered a just, magnanimous and pious Prince. So that by this it appears clearly to whom the miseries of these times are to be imputed. The remedy for all is, an act of oblivion and a general pardon.

God save the King.

David Jenkins,
now prisoner in the Tower.

28 *April* 1647.

THE VINDICATION OF JUDGE JENKINS

Prisoner in the Tower

I was convened upon Saturday the 10th of this month of April before a committee of the House of Commons wherein Mr. Miles Corbet* had the Chair, and I was there to be examined upon questions then to be propounded to me—to which questions I refused to give any other answer than that which was set down in a paper I then delivered to the said Mr. Corbet which followeth in these words :—

Gentlemen, I stand committed by the House of Commons for High Treason for not acknowledging nor obeying the power of the two Houses and by adhering to the King in this war. I deny this to be treason for the supreme and only power by the laws of the land is in the King. If I should submit to any examination derived from your power, which by the negative oath stands in opposition to the King's power, I should confess the power to be in you, and condemn myself as a Traitor which I neither ought nor will do.

I am sworn to obey the King and the laws of this land. You have not power to examine me by those laws, but by the King's writ, patent, or commission—

* Subsequently one of the Regicides.

if you can produce either thereof I will answer the questions you shall propound—otherwise I cannot answer thereto without the breach of my oath, and the violation of the laws, which I will not do to save my life.

You yourselves, all of you, this Parliament, have sworn that the King is our only and supreme Governor —your protestation—your vow and covenant—your solemn League and Covenant—your Declarations—all of them publish to the Kingdom that your scope is the maintenance of the laws. Those laws are and must be derived to us and enlivened by the only supreme Governor, the Fountain of Justice, and the Life of the Law—the King. The Parliaments are called by his Writs—the Judges sit by his Patents—so of all other officers—the Cities and Towns corporate govern by the King's Charters; and therefore since by the law I cannot be examined by you without a power derived by his Majesty, I neither can, nor will, nor ought, to submit to an examination by you upon any questions. But if, as a private Gentlemen, you shall be pleased to ask me any questions, I shall really and truly answer every such question as you shall demand.

This Paper hath been misrepresented to the good people of the City by a printed one styling it my Recantation, which I own not; and besides is it in itself repugnant (just like these times)—the Body falls out with the Head. To vindicate myself from that Recantation and to publish to the world the

reality of the paper then delivered to Mr. Corbet and the matter therein contained, I have published this ensuing discourse :—

No person who hath committed Treason, Murder or Felony hath any assurance at all for so much as one hour of life, lands or goods without the King's gracious pardon—27 Hen. VIII (24). The King is not virtually in the two Houses at Westminster whereby they may give any assurance at all to any person, in anything, for any such offence.

1. The House of Commons hath declared to the Kingdom in their declaration of the 28th November last to the Scots that the King at this time is not in a condition to govern. No person or thing can derive a virtue to other men, or things, which itself hath not, and therefore it is impossible that they should have a virtue from the King to govern, which they declare he hath not himself to give.

2. The Law of the Land is—That no person in any Parliament hath a voice in the House of Commons but that he stands a person to all intents and purposes as if he had never been elected or returned, if, before he sit in the House, he take not his oath upon the Holy Evangelists, that the King's Majesty is the only and supreme Governor over all persons in all causes. All the Members of the said House have taken it, and at all times as they are returned do take it, otherwise they have no colour to intermeddle with the public affairs. How doth this solemn and legal oath agree with their said Declaration—that the King is in no condition to govern. By the one it is sworn that he

is the only supreme Governor, by the other, that he is not in a condition to govern.

3. The oath is not that the King was, or ought to be, or had been, before he was seduced by an ill council, our only and supreme Governor in all causes over all persons, but in the present tense that he *is* our only and supreme Governor at this present, in all causes and over all persons. So they the same persons swear one thing, and declare to the Kingdom the contrary of the same thing, at the same time in that which concerneth the weal of all this Nation.

4. The Ministers in the Pulpits do not say what they swear in the House of Commons. Whoever heard, sithence this unnatural war, any of their Presbyters attribute that to His Majesty which they swear. The reason is this, their oath is taken at Westminster amongst themselves, that which their Ministers pray and preach goes amongst the people. To tell the people that the King is now their only and supreme Governor in all causes is contrary to that which the Houses do now practise, and to all they act and maintain. They, the two Houses, forsooth, are the only and supreme Governors in default of the King, for that he hath left his Great Council, and will not come to them, and yet the King desires to come, but they will not suffer him but keep him prisoner at Holmby, so well do their actions and oaths agree.

5. They swear now, King Charles is their only and supreme Governor, but with a resolution at the time of the oath taking, and before, and after, that he shall not be only or supreme Governor, or only and

supreme, but not any Governor at all—for there is no point of government but for some years past they have taken to themselves, and used his name only to abuse and to deceive the people.

6. That this virtual power is a mere fiction—Their propositions sent to Oxford, to Newcastle, to be signed by the King, do prove it so. What needs this ado—if they have the virtual power with them at Westminster ?

7. To affirm that the King's power (which is the virtue they talk of) is separable from his person is High Treason by the law of the land, which is so declared by that learned man of the Law, Sir Edward Coke, so much magnified by this present Parliament, who in the 7th part of his Reports on Calvin's Case fo. 11 saith thus :—

> " In the reign of Ed. II the Spencers, the Father and the Son, to cover the treason hatched in their hearts, invented this damnable opinion that homage and oath of liegeance was more by reason of the King's Crown (that is of his politic capacity) than by reason of the person of the King, upon which opinion they inferred three execrable and detestable consequences. 1. If the King do not demean himself by reason in the right of his Crown his lieges are bound by oath to remove him. 2. Seeing that the King could not be reformed by suit of law that ought to be done per asperté—that is—by force. 3. That his lieges be bound to govern in aid of him and in default of him."

All which were condemned by two Parliaments—one

in the Reign of Ed. II called Exilium Hugonis le Spencer—and the other in Anno i Ed. 3 cap. 2.

And that the natural body and politic makes one indivisible body and that these bodies incorporate in one person make one body, and not divers, is resolved as the Law of England—4 Eliz. Plow. Com. fol. 113 by Sir Robert Catlin, Lord Chief Justice of England, Sir James Dyer, Lord Chief Justice of the Common Pleas, and by many other Judges and those learned in the law.

8. The Law in all ages without any controversy is and hath been, That no Act of Parliament binds the subjects of this land without the assent of the King either for lands, goods or fame. No man can shew any syllable, letter, or line to the contrary, in the books of the law, or printed acts of Parliament in any age in this land. If the virtual power be in the two Houses, there needs no assent of the King's. The styles of the Acts printed from 9 H. 3 to 1 H. 7 were either, The King ordains at his Parliament, etc., or the King ordaineth by the advice of his Prelates and Barons and at the humble petition of the Commons, etc. In Henry VII, his time, the style altered and hath sithence continued thus, It is ordained by the King's Majesty, and the Lords Spirituall and Temporall and Commons in this present Parliament assembled. So that always the assent of the King giveth the life to all as the soul to the body and therefore our Law Books call the King the Fountain of Justice and the life of the Law.

9. Mercy as well as justice belongs by the Law of the Land only to the King. This is confessed by Mr.

Prynne, and it is so without any question. The whole and sole power of pardoning Treasons and Felonies belongs to the King and never more cause to have sufficient pardons than in such troublesome times as these, and God send us pardon and peace.

10. Queen Elizabeth summoned her first Parliament to be held on the 23rd January in the first year of her reign. The Lords and Commons assembled by force of the same writ but on the 21st day the Queen fell sick and could not appear in person in Parliament and therefore prorogued it until the 24th of the same month of January. Resolved by all the Judges of England, that the Parliament began not the day of the return of the writ, viz. the 23rd, when the Lords and Commons appeared, but on the 25th when the Queen came in person, which sheweth, evidently, that this virtual pretence is a mere deluding fiction that hath no ground in law, reason or sense. They have the King now a prisoner at Holmby with guards upon him, and yet they govern by the virtual power of their Prisoner. These are some few of the causes and reasons which moved me to deliver that paper to Mr. Corbet, which I am ready to justify with my life and should hold it a great honour to die for the honourable and holy laws of the land. That which will save this land from destruction is an act of oblivion and His Majesty's gracious general pardon.

Apr. 29, 1647.

AN ANSWER TO THE POISONOUS AND SEDITIOUS PAPER OF MR. DAVID JENKINS

(By H. P., a Barrister of Lincoln's Inn)

[H. P. (or Henry Parker, of Lincoln's Inn) was a remarkable man—though barely known to the present age—yet he was a sufficiently voluminous worker for his writings to occupy, as they still do to-day, several columns of the catalogue in the British Museum. Parker appears to have been equally at home in any field of enquiry, and a long way ahead of most of his contemporaries. He was, first of all, a Philosopher and Lawyer, then he could and did instruct the Merchant Princes of the City on trade and finance, whilst writing a history of the Kings of England at the same time, and to him belongs the distinction of having pointed out the then advantages to the country of the adoption of Free Trade—some 200 years before Richard Cobden was born.

The Protector, Oliver Cromwell, with that uncanny instinct in the discovery of human instruments for his service, seems afterwards to have discovered him—and thought the world of him.—EDITOR.]

Mr. David Jenkins in his Paper of the 29th April last lays most odious charges upon the Parliament, and consequently upon all who have adhered to the Parliament in this War, and lest these, his desperate infusions should not work powerfully enough upon the vulgar, he being an ancient practiser in the Law and promoted to the title of a Judge, he cites Book cases against the two Houses and seems forward to

lay down his life in the cause. The first argument runs thus—Parliament not having the King's Writ, Patent or Commission cannot do so much as examine any man—but the Parliament has not the King's Writ, etc., ergo :

2. His minor is confirmed thus—If the King's power remain solely in himself and be not virtually present in the two Houses then they cannot pretend his Writ, Patent, or Commission. But the King's power is in himself and not virtually in the two Houses, ergo :

3. That the Parliament has no virtual power he proves thus :—If the Parliament had in them the King's virtual power they needed not desire the King's ratification, they needed not send any propositions to him—but now they send propositions—ergo, this virtual power is a mere fiction.

4. To affirm that the King's power is separable from his person is by the Law adjudged High Treason —but if the Parliament say the King's power is virtually in them then they separate it from his person—ergo :

5. If none can pardon Felony or Treason except the King none has the virtual power of the King—but none can pardon except the King—ergo :

6. If the King be in no condition to govern then he is in no condition to derive virtual power.

7. If no one can sit in Parliament but that he must first swear that the King is the only supreme Governor over all persons in all causes then no member of Parliament nor the whole Parliament can suppose

him or themselves superior to the King—but none can sit in Parliament, etc.—ergo :

8. If no Act of Parliament bind the subject without the King's assent then there is no virtual power in the Parliament without the King's assent—but no Act binds, etc. Ergo :

Out of these premises which this grave gentleman judges to be irrefragable he concludes that the Parliament denies the King to be supreme Governor—nay to be any Governor at all—inasmuch as there is no point of Government. He says—" but the Parliament for some years past have taken to themselves using the King's name only to abuse and deceive the people." He says further the Parliament pretends against the King because he has left the great council and yet the King desires to come, but cannot, because he is by them kept prisoner at Holmby.

Lastly he says the Houses are guilty of perjury as well as of cheating the people and rebelling against the King inasmuch as at the same time they swear him to be the only supreme Governor, yet declare him to be in no condition to govern.

How easy these things may be answered and refuted let the world see for

Firstly—It cannot be denied that Parliament sits by the King's Writ, nay if Statute Law be greater than the King's Writ it cannot be denied but that the Parliament sits or ought to sit by something greater than the King's Writ and if it be confessed that Parliament sits by the King's Writ—but does not act by the King's Writ, then it must follow that the Par-

liament is a void vain Court and sits to no purpose, nay, it must also follow that the Parliament is of less authority, and of less use than any other inferior Court, forasmuch as it is not in the King's power to control other Courts, or to prevent them from sitting or acting.

2. This is a gross non sequitur. The King's power is in himself. Ergo—it is not derived to, nor does reside virtually in the Parliament for the light of the Sun remains embodied and unexhausted in the Globe of the Sun at the same time as it is diffused and displayed throughout the air—and who sees not that the King without emptying himself gives commissions daily of Oyer and Terminer to others which, yet, he himself can neither frustrate nor elude. For my part I conceive it is a great error to infer that the Parliament has only the King's power because it has the King's power in it, for it seems to me that Parliament does both sit and act by concurrent power devolved both from the King and Kingdom—This is more obvious and apparent in some things than in others. For by what power does Parliament grant subsidies to the King? if only by the power which the King gives then the King may take subsidies without any grant from the Parliament and if this be so by a power which the people give to Parliament it will follow that the Parliament has a power given by both King and Kingdom.

3. The sending propositions to the King and desiring his concurrence is scarce worth an answer for subjects may humbly petition for that which is

their strict right and property—Nay it may sometimes beseem a superior to prefer a suit to an inferior for matters in themselves due, God himself has not utterly disdained to beseech his own miserable, impious, unworthy creatures, besides, 'tis not our tenet, that the King has no power because he has not all power, nor that the King cannot at all promote our happiness because he has no just claim to procure our ruin.

4. We affirm not that the King's power is separated from his person as the two Spencers affirmed, neither do we frame conclusions out of that separation as the two Spencers did, either that the King may be removed for misdemeanours or reformed per asperté, or that the subject is bound to govern in aid of him. We only say that his power is distinguishable from his person, and when he himself makes a distinction betwixt them—commanding one thing by his legal writs, Courts, and Officers and commanding another thing extrajudicially by word of mouth, letters or Ministers, we are to obey his power rather than his person.

5. We take not from the King all power of pardoning delinquents we only say it is not proper to him "quanto modo." For if the King pardon him who has murdered my son, his pardon shall not cut me off from my appeal and 'tis more unreasonable that the King's pardon should make a whole State which has suffered, remediless than any private man. So if the King should deny indemnity to those which, in the fury of war, have done things unjustifiable by the Laws of peace, and thereby keep the wounds of the State

from being bound up, 'tis equitable that an act of Indemnity should be made forcible another way. And if this will not hold yet this is no good consequence: the King is absolute in point of pardons, therefore he is absolute in all things else and the Parliament hath no power to discharge delinquencies, therefore it has no power in other matters.

6. The Parliament has declared the King to be in no condition to govern, but this must be interpreted rigidly and without a distinction, for if the King with his sword drawn in his hand and pursuing the Parliament and their adherents as rebels, be not fit for all acts of Government yet 'tis not thereby insinuated that he is divested of the habit or right of governing. If he be unqualified now he is not unqualified for the future. If he may not do things destructive to the Parliament, he is not barred from returning to the Parliament, or doing justice to the Parliament. This is a frivolous cavil and subterfuge.

7. We swear that the King is our supreme Governor over all persons, and in all causes, but we do not swear that he is above all Law, nor above the safety of his people, which is the end of the Law and indeed paramount to the Law itself. If he be above all Law or liable to no restraint of our Law then we are no freer than the French or the Turks, and if he be above the prime end of law, i.e., common safety, then we are not so free as the French or the Turks, for if the total subversion of the French or the Turks were attempted, they might, by God's law, imprinted in the book of Nature, justify a self defence—but we

must remedilessly perish when the King pleases to command our throats. Besides, how achieved the King of England such a supremacy above all Law and the community itself, for whose behoof Law was made? If God's donation be pleaded, which is not special to him or different from what other Kings may pretend to, then to what purpose serve our laws, nay, to what purpose serve the Laws of other Countries? for by this general donation all nations are condemned to all servitude as well as we. If the Law of the land be appealed to, what books hath Mr. Jenkins read? where hath he found out that Lex Regia whereby the people of England have given away from themselves all right in themselves? Some of our books tell us that we are more free than the French, that the King cannot oppress us in our persons or estates, by imprisonment, denying justice, or levying taxes without our consent. Other books tell us that the safety of the people is the supreme law, and that the King hath both God and the Law for his superior. But all this is nothing to the learned Mr. Jenkins.

8. We admit that no acts of Parliament are complete or formally binding without the King's assent, yet this is still to be denied, that therefore, without this assent particularly expressed, the two Houses can do nothing, nor have any virtual power at all. No—not to examine Mr. Jenkins—nor to do any other thing of like nature; though in order to public justice and safety.

CORDIAL OF JUDGE JENKINS FOR THE GOOD PEOPLE OF LONDON

(in reply to a Thing called an Answer to the poisonous and seditious Paper of Mr. David Jenkins. By Mr. H. P.—a barrister of Lincoln's Inn).

After the said Mr. H.P. hath made a recital of the Heads of my Vindication he deduceth his Answer into these eight particulars, which follow verbatim—To the first—

1. I was examined by a Committee appointed by the House of Commons, I say and said that the House of Commons have no power to examine me for that it is no Court—every Court hath power to examine upon oath. This power the House of Commons never claimed. The Courts of Pie Powder, Court Baron, Hundred Court, County Court and every other Court of Record, or not of Record, hath power to examine upon oath, and an examination without oath is a communication only: examination in law is upon oath.

There is no Court without a power of trial. The House of Commons hath no power to try any offence nor ever practised it by Bill, Indictment, Information, Plaint or Original to deduce it to trial, nor to try it by verdict, demurrer, or examination of witnesses upon

oath, without which there can be no condemnation or judgment and that which can attain to no reasonable end the Law rejects as a thing inutile and useless—sapiens incipit a fine.

The Writ whereby they are called gives them power Ad faciendum et consentiendum. To what ? to such things quae ibidem de communi Consilio ordinari contigerint (viz.) in the Parliament. This makes nothing at all of a Court for the House of Commons,—that Consilium which that Writ intends, is cleared partly by the Writ for choosing Knights, etc., for the King by that Writ is said to resolve to consult and treat with the Prelates and Peers of the Kingdom for and touching the great concernments of the Commonwealth (for the King never sits in the House of Commons): and this also is made evident by the writs to the Prelates, Peers, Judges and to his Counsel at law. The words in their Writs are " to appear and attend the Parliament Consilium impensuri " the one doth " consulere," the other " facere et consentire."

The House of Lords, where the King sits in person assisted by his Lords, Judges, Sergeants, Attorney, Solicitor, Masters of the Chancery is a court of Record to many purposes set down in the Books of the Law and the Statutes of the Land and that Court is only in the House of Lords, where the King sits.

A court must either be by the King's Patent, Statute Law or by the Common Law which is common and constant usage. The House of Commons hath no Patent to be a Court nor Statute Law to be a Court, nor common usage. They have no Journal Book but

since Edward VI time. Was there ever Fine by the House of Commons estreated into the Exchequer? For Murder or Felony they can imprison no man much less for Treason. The House which cannot do the less cannot do the greater.

It is ordained that no man shall be imprisoned or put out of his franchise by the King or his Council but upon Indictment or presentment of his good and lawful neighbours where the deed is done or by original Writ at the Common Law and so is Lex Terrae the Law of the Land, mentioned in Magna Charta (c. 29) expounded, and the said Magna Charta and Charta de Foresta are declared by the Statute of 25 Ed. to be the Common Law of the land. All Judges and Commissioners are to proceed secundum leges et consuetudinem regni Angliae, as appears by all proceedings in all Courts and by all Commissions and therefore the House of Commons by themselves proceeding not by Indictment Presentment or Original Writ have no power to imprison men or to put them out of their franchise.

This in no way trenches upon the Parliament for it is in Law no Parliament without King and both Houses. I have only in my Paper delivered to Mr. Corbet applied myself to that Committee that they had no power to examine me but I never thought, said or wrote that the Parliament had no power to examine me. The law and custom of this Land is that a Parliament hath power over my life, liberty, lands and goods and over every other subject—but the House of Commons of itself hath no such power.

For the Lord Coke's relation—that the House of Commons have imposed fines and imprisoned men in Queen Elizabeth's time and since (few facts of late times, never questioned, make no legal power nor Court)—a facto ad jus—is no good argument; for the words of the Statute of 6 Henry VIII (c. 16) that a licence to depart from the House of Commons, for any member thereof, is to be entered of record in the book of the Clerk of the Parliament appointed, or to be appointed for that House, doth not conclude that the House of Commons is a Court of Record.

For first, that Law of 6 Henry VIII (c. 26) handles no such question as that whether the House of Commons be a Court. It is a maxim in all laws, Lex aliud tractans nil probat. The word (Record) there mentioned is only a memorial of what was done and entered into a book. A plaint removed out of the County Court to the Court of the Common Pleas hath these words in the Writ of remove " Recordari facias loquelam, etc.," and yet the County Court is no Court of Record and so for ancient Demesne in a Writ of false judgment, the words are " Recordari facias loquelam " etc. and yet the Court of ancient Demesne is no Court of Record—and so of a Court Baron—The Law and custom of England must be preserved or England will be destroyed and have neither law nor custom.

Let any man show me that the Court of Lords or the House of Commons in any age hath made any man a Delinquent (Rege dissentiente) under his Great Seal. Sir Giles Mompesson, Mitchell, and others of

late were condemned by the prosecution of the House of Commons in King James' time. Did King James ever contradict it? And so of ancient times—where the House of Peers condemned Lord Latimer in 50 Ed. 3 the King's pardon freed him, which shews clearly that the King's express or implied assent must of necessity be had to make a delinquent.

The Gentleman saith that the Parliament sits or ought to sit by something greater than the King's writ, etc. No Parliament did ever sit without the King's writ, nor could ever Parliament begin without the King's presence, or by a guardian of England by Patent under the King's Great Seal, the King being "in remotis," or by Commission under the Great Seal to certain Lords representing the King's person and hath been thus in all ages until this Session of Parliament wherein His Majesty hath been pressed and hath passed two Acts of Parliament—one for a triennial Parliament and another for a perpetual, if the Houses please to satisfy their desires. How these two Acts agree one with another and with the Statute in the time of Ed. III, where Parliaments are ordained to be holden every year, and to what mischiefs to the people of this Land such length of Parliaments will produce by protections and privileges to free them and their menial servants from all debts during their lives if they please to continue it so long, and how destructive to men's actions against them by reason of the Statute of Limitations which confines their actions to certain years, and many other inconveniences of greater importance, is easy to understand.

How can any man affirm that the two Houses do act now by the King's Writ which relates to counsel and treaty with the King concerning him, the defence of his Kingdom and of the Church of England. They keep their King prisoner at Holmby and will not suffer him to consult and treat with them. They have made a vow and a covenant to assist the forces raised and continued by both Houses against the forces raised by the King without their consent, and to the same effect have devised the Oath which they call the negative oath. Is this to defend the King's Kingdom or their Kingdom ?

When by their solemn League and Covenant they extirpate Bishops, Deans and Chapters root and branch, is this to defend the Church of England ? (that Church must necessarily be meant—that was the Church of England when their Writ bore test). They were not summoned to defend a Church that was not in being—to destroy and defend the Church are very contrary things. The Church is not defended when they take away and sell the lands of the Church.

The gentleman saith the King cannot control other Courts of Justice or prevent them from sitting, or acting and therefore not the two Houses, etc. It is true the King cannot control or prevent his other Courts, for that they are his ordinary Courts of common Justice, to administer common right unto all men according to the fixed laws. The Houses make no Court without the King. They are no Body Corporate without the King nor Parliament without the King who is the Head, and the Court is in the Lords House

where the King is present—and as a man is no man without a head so the Houses severed from the King, as now they are, have no power at all, and they themselves by levying War against the King, and imprisoning him, have made the Statute for not dissolving, adjourning, or prorouging this Parliament of no effect by the said acts of their own. They sit to no purpose without his assent to their Bills. They will not suffer him to consult with them, and treat and reason with them whereby he may discern what Bills are fit to pass and what not, which in all ages the Kings of this Land have enjoyed as their undoubted rights and therefore they sit to no purpose by their own disobedience and default.

For the ordinary Courts at Westminster the Judges in all those courts are Judges by the King's Patent or Writ, otherwise they are no Judges. The Houses can make no Judges. They who are made by them are no Judges at all. The whole and sole power is in the King—The King cannot control or prevent his own Judges from sitting or acting, but the Houses he may for they are by his Patent, not his judges but the Houses. In his other Courts the King commits his power to his Judges with whom he cannot interfere, but the King is both Judge and Controller in the Court of Parliament quoad acta for his assent or dissent doth give life or death to all Bills. Many lawyers have much to answer to God, this Kingdom, and to posterity for puzzling the people of this land with such fancies as the gentleman who wrote the answer to my paper, and others have published in these

troubles which hath been none of the least causes of the raising and continuing of them—and so I have done with the first part of his answer.

2. For the non sequitur in the second section of the gentleman's answer the antecedent and the consequent are his own.

> Quem recitas, meus est (O Fidentine), libellus
> Sed male dum recitas incipit esse tuus.

My words are that the King is not virtually in the two Houses at Westminster to enable them to grant pardons for that whole and sole power cannot be derived to others, or the virtue of his power, for his power and the virtue of his power is in all patents of his Judges, in charters to corporations, in commissions of all sorts and in the Parliament assembled by force of his writ of summons so long as they obey him, but when they renounce that power and claim it not from the King and declare to the Kingdom that he is not in a condition to govern, and imprison him and usurp to themselves all royal authority as the two Houses now do, no reasonable man can affirm that they act by the power of their prisoner who hath no power to give them, that, by force of arms, take all the power to themselves.

The gentleman saith, the King grants commissions daily of oyer and terminer which he cannot frustrate nor elude. The King may revoke and discharge the commission by his Writ as he may remove all Judges and place other men in their room, and any King's death determines all the judges patents of Westminster Hall, commissions of oyer and terminer, etc., and so

he might dissolve both Houses in all times by his Writ under the Great Seal until that by this Parliament, by his own concession the King of his goodness hath secluded himself, which goodness hath been full ill requited.

The gentleman affirms that the power the Parliament hath, is concurrent from the King and Kingdom which he conceives is proved by the grant of subsidies to the King by the Parliament. The mistaking of this word (Parliament) hath been mischievous in these times to this Land, and it is affectedly mistaken which makes the sin the greater: for the two Houses are not the Parliament as before is declared, and at this time so to inculcate it, when all men know, that of the 120 Peers of the Kingdom who were temporal Peers before the troubles, there are not now 30 in the Lords House, and in the House of Commons above 200 of the principal gentlemen of the Kingdom left the House, and adhered to His Majesty who is imprisoned by what is left of them, shews no such candour as is to be desired.

It is true that no tallage can be laid upon the people of this land but by their consent in Parliament as appears by 25 Ed. 1 and 34 Ed. 1, but you shall find in Mr. Selden's learned Book "Mare Clausum" a number of precedents in Henry the third's time, for ship money justly condemned by this Parliament to the which His Majesty assented, and in truth, that ship money was condemned before by the said two Statutes "de tallagio non concedendo." Dane-gelt, Englishry—and many grievous burdens were laid

upon the people and borne until that memorable Prince's time. But I am of opinion that the Common law of the land did always restrain Kings from all subsidies and tallages but by consent in Parliament which doth appear by Magna Charta, the last chapter, where the Prelates, Lords and commonalty gave the King the fifteenth part of their moveables. In truth, it is no manner of consequence because the King cannot take what he pleaseth of the subjects' goods, that therefore, they have a concurrent power in Parliament. There have been many Parliaments and no subsidies granted. Parliaments may be without subsidies, but subsidies cannot be without Parliaments. Of ancient time Parliaments rarely granted any unless it were in the time of foreign wars, and in my time, Queen Elizabeth refused a subsidy granted in Parliament—and in the Parliament of 1 Jac. none were granted. The Gentleman should make a conscience of blinding the people with such untrue colours to the ruin of King and people.

3. The Gentleman affirms that the sending propositions to the King and desiring his concurrence is scarce worth an answer for subjects may humbly petition for that which is their strict right and property. The propositions sent to Newcastle are in print—wherein the two Houses are so far from humbly petitioning that they style not themselves His Majesty's subjects, as appears by the propositions.

That they have a strict right or property to any one of these propositions is a strange assertion, every one of them being against the laws in force. Have

the two Houses a strict right and property to lay upon the people what taxes they shall judge meet? To pardon all treasons, etc.? that is one of their propositions. Have they a strict right and property to pardon themselves? And so for all the rest of their propositions.

These propositions have been voted by both Houses. The King's assent (they being drawn into bills) makes them Acts of Parliament. Hath the King no right to assent or disassent? Was the sending but a compliment? All our law books and statutes speak otherwise. This Gentleman and others must give an account, one time or other, for such delusions put upon the people.

4. The Gentleman saith they affirm not that the King's power is separated from his person so as the two Spencers affirmed, etc. His Majesty's person is now at Holmby under their guards. Have they not severed his power from him, when, by no power they have left him, can he have two of his Chaplains who have not taken their Covenant to attend him for the exercise of his conscience?

For the three conclusions of the Spencers do not the two Houses act every of them? They say His Majesty hath broken his trust touching the government of his people. They have raised armies to take him, they have taken and imprisoned him; they govern themselves: they make laws, impose taxes, make Judges, Sheriffs and take upon them "omnia insignia summae potestatis." Is not this to remove the King for misdemeanours, to reform per asperté, to govern in aid of him: the three conclusions of the

Spencers? Do they think the good people of England are become stupid and will not at length see these things?

The Gentleman saith they do not separate the King's power from his person but distinguish it, etc. His power is in his legal writs, courts and officers. When they counterfeit the great seal and seal writs with the same, make Judges themselves, Courts and Officers by their own ordinances against his consent, declared under his true Great Seal of England (not by word of mouth, letters or ministers only) their seal is obeyed, their own writs, their own Judges, their own Courts, their own Officers and not the King's. The time will come when such strange actions and discourses will be lamented.

5. The Gentleman goes on. We take not from the King all power of pardoning delinquents. We only say it is not proper to him "quanto modo" etc. What do you mean by "quanto modo"? I am sure "omnis Rex Angliae solus Rex et semper Rex," can do it and none else. Read the books of the law to this purpose collected by that reverend and learned Judge Stanford from all antiquity to his time, who died in the last year of King Philip and Queen Mary's reign you shall find this a truth undeniable and this power was never questioned in any age, in any book, by any, until this time that everything is put to the question. You gentlemen who profess the law, and maintain the party against the King, return at length, and bring not so much scandal upon the law (which preserves all) by publishing such incredible things.

We hold only what the law holds. The King's prerogative and the subjects' liberty are determined and bounded and admeasured by the written laws what they are. We do not hold the King to have any more power neither doth His Majesty claim any other but what the law gives him. The two Houses by the law of this land have no colour of power either to make delinquents or pardon them—the King contradicting, and the army under Sir Thomas Fairfax (howbeit but soldiers) do now understand that to be law, and do now evidently see, and assuredly know, that it is not an ordinance of the two Houses, but an act of Parliament made by the King, Lords and Commons that will secure them. And let this Army remember their executed fellow soldiers and the law has always been so taken by all men until these troubles that have begot monsters of opinions.

6. The Gentleman says the Parliament hath declared the King to be in no condition to govern, etc.

There is no end of your distinctions. I and you profess the law. Shew me the law for your distinctions, or letter, syllable, or line, in any age, in the books of the law, that the King may in one time be in no condition to govern, and yet have the habit of governing, and another time he may (viz.) when the two Houses will suffer him. The law saith thus: Ubi lex non distinguit, non est distinguendum.

He says further: The King is not barred from returning to his Parliament (or as he calls the two Houses). He knows the contrary. The whole City knows the contrary. Nos juris consulti sumus sacer-

dotes (as Justinian, the Emperor, hath it in the first book of his Institutions) and therefore knowledge and truth should come from our lips. Worthy and ingenious men will remember and reflect upon that passage of that good and wise man Seneca: Non qua itur, sed qua eundum: follow not the ways of the lawyers of the House of Commons. God forgive them. I am sure the King will, if they be wise, and seek it in time.

7. The Gentleman says, We swear that the King is our supreme Governor over all persons and in all causes, etc. Why hath he left out the word (only)? for the oath the Members now take is That King Charles "is now the only and supreme Governor in all causes, over all persons": and yet they keep their only supreme Governor now in prison and act now in Parliament by virtue of their prisoner's writ, and by a concurrent power in this Parliament and by their own strict right and property (as the gentleman affirms in his answer). These things agree well with their oath that the King is the only supreme Governor in all causes, over all persons. This oath is taken now in the Parliament time by all members of the House of Commons and is required by the law to be taken in all Parliaments, otherwise they have no power nor colour to meddle with the public affairs.

This oath being taken in Parliament that the King is the only and supreme Governor in all causes—then it follows in Parliament causes: over all persons—then over the two Houses. Let them keep this oath and we shall be sure of peace in the land. And good

Lawyers ought to desire peace both for the public good and their private, and not dishonour that noble profession as many do in this miserable time.

The Gentleman says, We do not swear that the King is above all law, nor above the safety of his people: neither do We so swear, but His Majesty and we will swear the contrary and have sworn, and have made good and will by God's grace make good our oath to the world that the King is not above the law nor above the safety of his people. The law and the safety of his people are his safety, his honour and his strength.

8. The Gentleman concludes that Acts of Parliament are not formally binding nor complete without the King's assent, yet the Houses have a virtual power without the King's particular assent to do things in order to public justice and safety (viz.) in setting up the excise, in raising and maintaining of armies, in taxing the people at pleasure with fifth and twentieth part, fifty subsidies, sequestrations, loans, compositions, imprisoning the King, abolishing the Common Prayer Book, selling the Church lands, etc. All these are in order to public justice and safety ?

Mr. H.P., you are of my profession. I beseech you for the good of your Country, for the honour of our science, pursuade yourself and others, as much as in you lies, to believe and follow the monition and counsel of that memorable, reverend, and profoundly learned in the laws and customs of the land, the Lord Coke, who writes as becomes a great and learned Judge of the Law (a person much magnified by the two Houses)

in these words: Peruse over all Books, records, and histories and you shall find a principle in law, a rule in reason, and a trial in experience, that Treason doth ever produce fatal and final destruction to the offender and never attains to the desired end (two incidents inseparable thereunto) and therefore let all men abandon it, as the poisonous bait of the Devil and follow the precept in Holy Scripture—Serve God, honour the King and have no company with the seditious.

Conclusion. I say again, that without an Act of Oblivion, a gracious general pardon from His Majesty, the arrears of the soldiers paid, a favourable regard had to tender consciences, there will be neither truth nor peace in this land, nor any man secure of any thing he hath.

REJOINDER OF H.P. OF LINCOLN'S INN TO MR. DAVID JENKINS' CORDIAL

In all the Papers which Master Jenkins weekly publishes to slander and condemn the Parliament of rebellion, perjury, oppression, couzenage, etc., his main artifice, and that which most affects the people, is his blending and confounding things together which are in nature different and by all means ought to be discriminated. In three things, especially, his want of ingenuity is most obvious, and his not distinguishing most advantageous to him, for, first, he puts no difference betwixt that latitude of power which is due to a just King, in just things, and when he pursues the true interest of his people, and that power which consists in doing wrong. And, yet, nothing is more notorious than this, that the Kings of England have vast Prerogatives in doing good but none at all to do any man, much less the whole State, harm. Secondly, he distinguishes not between those actions of the Subject which are done in times of necessity and upon extraordinary extremities, and those which are done in ordinary times when there is no special emergent cause to enforce them. Thirdly, he compares not the smaller matters of the Law with the weightier, but attributes to both alike, nay, when both cannot consist or take place at the same time, he makes the weightier

law give way to that which is the less consequence and may be reckoned inter apices juris.

The law will admit of a private mischief rather than a public inconvenience, as nature will suffer this particular quantity of water contrary to its own propensity, to be violented and rapt upwards, rather than that any vacuity should be in the universe. But Master Jenkins sometimes will endure public mischief rather than private inconvenience; he will rather allow "Salus populi" shall be opposed than such or such a branch of prerogative or the propriety of the Subject should be strained. Law is not so dull a subject as some men would have it, nor are its bounds restrained to the ordinary actions and pleas of "a Nokes and a Stiles" about a carve of ground, etc.—No—the profession is farre more noble and, as its basis is reason improved with logic, so its pyramis is policy crowned with History and Philosophy. That lawyer therefore that will argue upon this high subject which Master Jenkins now undertakes, ought to root himself deeper before he begins to build up his argument, and to take notice of these premises.—

1. That all men who are qualified and exalted to bear rule in a sphere above other men are so dignified and differenced by some commission, which commission must be granted by man immediately, or else by God extraordinarily and immediately.

2. That in this age (which knows of no oracles or miracles remaining) God does not immediately and otherwise than by the same Providence as rule in other human affairs either design the persons or distinguish

the prerogatives of any Kings or Potentates. God is not said more properly to promote to the Crown of England Edward the fourth than Henry the sixth, nor to make a King of France more unlimitable than a King of England. These things are left to men, the same providence of God attending them as attends other matters. Yea, the scripture is most clear in this, that when God by immediate and extraordinary orders from Heaven did interpose in designing Saul to the Throne of Israel, yet he did it by lottery, and did it so that Saul might be said elected and constituted by the people as well as designed by God. And indeed since all Princes whether hereditary or elective, whether more absolute or more conditionate, whether enthroned by just title or by tortion and mere force, have commissions equally from Heaven. How can we think that Heaven acts immediately alike in all? since Cyrus is as well God's anointed in those provinces which he wins by the sword, as in those which come to him by descent—and the French King is as truly God's vice-regent now in France as Charles (whom he has intruded upon) is in England: and since the King of Spain by special law of Heaven can claim no larger supremacy in Castile than in Burgundy, in Naples than in Aragon, what an unreasonable thing it is to ascribe all these devolutions of rule and variations of power to the immediate hand of God, which changes not, rather than to the acts of men which are seldom permanent.

3. That, if we will suppose that Princes' commissions are all immediately drawn and signed by God

yet we cannot suppose that God's commission ever enabled any man to do injury, his charge to all Kings is contrary and does inhibit all violence in comportment, nay even all elation of heart. And for man (so far as Princes are inaugurated upon Earth) we see by experience they all almost have their visible Terriers and Boundaries set to them—and it were most unnatural if the intendment of all humane laws should not refer to the safety of the people.

4. That if any obscurity or ambiguity be in other laws yet in the laws of England there is none at all. Our Books proclaim our Nation to be a free nation and our Kings to be limited from doing any wrong, and because there may be disputes about the interpretation of these generals, therefore particulars are deduced out of them and our laws do not only declare us free, but wherein our freedom consists, nor do they bind the King from wrong but specify withal what is wrong to the Subject. If the King arbitrarily change our laws, raise subsidies, impose taxes, imprison our bodies, deny, delay or sell justice to us, this is declared to be wrong and inconsistent with our freedom. And if any question arise about our Charters, the King himself cannot interpret or sit as Judge. He is in all cases taken to be a party and so incompetent to sit as Judge. His sworn Judges are to do right betwixt him and the subject out of Parliament and the two Estates are to do right above the Judges, if need be, in Parliament. And in case of perplexity or doubt the liberty and safety of the people is to be preferred before the prerogative of the King, and all interpretations

must rather favour that interest which is general than that which is particular. And for the military power of England, as the King ought not to use any other than the natural Liege people of England in his Wars—so neither can he press the people of England to serve in his Wars at discretion. If the War be foreign, or against a foreign power the Parliament ought to be consulted in it, but if force be used against Subjects that force is to be merely subservient to law and whether it be to execute ordinary judgments or to suppress riots or insurrections how dangerous or great soever—the Sheriff, and other ordinary officers of Justice ought to be employed in the business, and those which are so employed are to be directed solely by the Judges and Courts of the Land in speeding law and not at all by any extra judicial command of the King in opposition to law. If these things were not so the King of England could not be restrained from doing wrong, our Kings would be above all law and the law could have no power above them, and if our Kings were above laws and not restrainable thereby from doing wrong, the people of England were not a free people but as remedilesse slaves as the Grand Seignior's vassals are. Our Laws provide against servitude in us, but that were vain if they did not provide also for efficacy in themselves in so much as laws—if the King were above them, and so might alter them at pleasure or interpret them, according to his own sense, or could execute, or not execute at discretion by being sole master of the sword—would be no better than cobwebs to us.

By the light which reflects from these fundamentals premised, we shall now the better view and examine that which Mr. Jenkins replies to the eight particulars of H.P.

In the first particular the question is, Whether the House of Commons have power to examine a Delinquent or no. Mr. Jenkins holds the negative upon this ground that they have neither the King's Writ, Patent nor Commission for it. It was answered that they did both sit and act by the King's writ and something greater than the King's writ. Mr. Jenkins not being able to deny that the Parliament was summoned by the King's writ and that it is continued still by an Act passed since, only quarrels at the act of continuance, pretending that the act by which this Parliament is continued agrees not with the Act passed lately for a triennial Parliament, nor with that for an annual Parliament passed in Edward the third's time, as also that it is mischievous otherwise by protections, privileges, etc. Is not this to quarrel with the King and both Houses? Is not this to tell us that Mr. Jenkins is wiser than all the three Estates, though joined together. The King, the Lords and the Commons judged that this Act did agree with the other two, yet Mr. Jenkins judges contrary. The King, the Lords and the Commons judged the advantage of this Act to be greater than any inconveniences—Mr. Jenkins is of another mind. Our Books have a Rule, That no man ought to be wiser than Law. Mr. Jenkins exempts himself out of this Rule, but in the next place whatsoever the three Estates may do, yet

Mr. Jenkins tells us that the two Houses make no Court nor Body Corporate, nor Parliament without the King—nor more than a man remains a man without a head. Here is the mistake—Mr. Jenkins thinks the King is a head to the Parliament simpliciter or physice, whereas he is so but secundum quid or metaphorice, for if he were such a head to the Body Politick, as the true head is to the natural Body the body could have no subsistence without him—but experience in our case teaches us the contrary and we can easily calculate that if the whole Royal line should be spent and the Crown escheat sitting of Parliament, the Lords and Commons would remain a living Parliament and be the supreme power of the Kingdom without a King: also if this should happen out of Parliament the Lords joining with the chosen representatives of the whole Kingdom would be equally as competent (if not more) for all acts of Majesty and supreme dominion as now they are in Parliament. Mr. Jenkins must needs also know that there are some acts of Parliament yet of force in this land which by the Lords and Commons were carried and consummated not only without, but even against the King, but I forbear to draw censure upon myself by citing them—and whereas it was objected that the Parliament was in a meaner condition than other inferior Courts, if the King's mere discretion could so make their deliberations void and vain, Mr. Jenkins replies, That this is most true and just for as much as in other Courts the King can neither judge nor control but in the Court of Parliament (quoad Acta) the King is both

Judge and Controller. And why cannot the King judge and control in the ordinary Courts? Because there they have the King's power committed to them by patent, and as they are sworn to do right, so the King is sworn not to interrupt or frustrate them. Thus:—

1. We see that the King's Patent to a few men is more vigorous than the most honourable Writ of the Law is when it is directed from the King to all the Peers and Commons of the land abetted besides with formal Statutes.

2. We see an oath taken from the Judges is of more value than the faith and loyalty of the whole people.

3. We see the King by his Coronation Oath is stronglier obliged not to obstruct justice in private cases depending before lower Courts than the general safety and welfare of the people in that threefold counsel which is so honourable that none ought to think ignobly of it.

4. We must grant that Mr. Jenkins can better tell what the Law is in this point than both Houses.

5. Whereas an argument ab inconvenienti was valid in law before, now an argument drawn from the safety and liberty of the whole State and from the end of all Law is made ridiculous by Mr. Jenkins for he who grants we are born to liberty and safety as our right, yet grants no means to attain to that right, nor remedy to recover it except the King's grace and even then the grand Seigneur's subjects have their Master's grace and discretion to depend upon as well as we.

Thus is our State like a goodly Ship exquisitely designed, strongly manned and abundantly rigged with all kinds of tackling, and so built for agility in fair weather, that nothing in that respect can be added to her perfection, yet still she is so moulded by these kinds of Royalists that the least foul weather oversets her. We have excellent laws to secure our properties against the Crown, we have excellent privileges in Parliament to secure our laws against the Judges and other Ministers of the Crown, and yet, nevertheless, the Parliament itself is so discontinuable, dissolvable and controllable by the Crown that our all which depends upon it, has nothing in the last place to make itself good to us but the favour of the Crown.

Thus may our Laws and Privileges in which there is acknowledged to be a directive but no co-active force over the King be compared to an imaginary mathematical line in the Heavens but not to any fence or circumvallation upon the Earth. Well may they inform the King what we ought to enjoy, as the Laws of God and nature without them do to all other nations but they can never assure us what we shall enjoy. And therefore, I wonder why the Royalists should so much extol the rare Constitution of this Kingdom when besides some other powers of the Crown they ascribe to the King such a negative voice in Parliament as is sufficient alone to destroy all that is granted us in all things else. But to return to our reply :

'Tis maintained next that whatsoever power is in both Houses yet there is no power in the House of

Commons to examine at all, because the House of Commons cannot administer an Oath and examination without oath is a mere communication and rejected as unprofitable in law.

One reason why the House of Commons cannot examine upon oath is because it is no Court, and it appears to be no Court, because it has no power of trial, nor ever practised any such power by Bill, Indictment, Information, Plaints or Original. And for the Lord Coke's relation that the House of Commons have imposed Fines and imprisoned men in Queen Elizabeth's time, and since : he says these are but late and a few matters of fact, and " a facto ad jus " is no good argument. Here we see the greatest plea against the House of Commons is the non user of any such power, yet when the user is proved, then 'tis objected.

A second reason against the House of Commons being a Court is because it has neither the King's Patent nor any Statute nor common usage to make it so. The House of Lords is acknowledged to be a Court of Record to many purposes, partly because the King sits there, and partly because there is clear law for their privileges, but the House of Commons is excepted against (as not within these reasons). The truth is both Houses are but one Court and one Council and the time has been when they have both sat in one place together, and there may be good reason given why they may sit severally and have their privileges kept distinct, and why the Lords should be more active in some matters of judgment where the

whole Commonalty's interest is not touched but this is no proof that what the Lords act by themselves receives no influence from the House of Commons, or that the House of Peers is of more value in the eye of the law, or has any greater jurisdiction by the law than the representative Body of the whole State. As for the King's sitting in the House of Lords, there is but little moment in that, in regard that he sits not there to judge, or to debate but only to propose and consent. And there is no law to debar him from the like in the House of Commons, and so it was when both Houses sat together and still is when they meet together. And secondly whereas some Patent, Statute or Usage is demanded from the House of Commons in maintenance of their judicial power. This we say is unreasonable. Nay if any Patent, Statute or Usage could be produced for preference of the Peerage before all the Knights, Gentlemen and Commons of England on this point—that were rather to be rejected, as most unjust and unnatural. A third reason is brought against the House of Commons out of the Writ of Summons, forasmuch as in that Writ the King resolves, consults and treats with his Peers, super ardua regni—but the Commons are called ad faciendum et consentiendum in iis quæ ibidem de communi consilio ordinari contigerint. These words of the Writ though they are general and in some things ambiguous, yet they are no more disadvantageous to the Commons than to the Lords or King. But if words are to be interpreted by the practice of Parliaments, and by the tenour of all our

other laws we shall find that the King's part is to propose and consent but not to debate—that the Lords' part is to propose, debate and consent on some things but not in all. That the Commons part is to propose, debate and consent in all. And this appears by the raising of treasure, the grand concernment of the Kingdom called justly "Ornamentum pacis et firmamentum belli," and in this, though the King and Lords may propose and consent yet none but the Commons may propose, debate and consent. From reasoning Mr. Jenkins now betakes himself to railing and tells both Lords and Commons that whatsoever their Writ meant they act now quite contrary for by their Writ they were required to treat and consult with the King, concerning the King, the defence of the Kingdom and the Church. Whereas they first imprison the King, next arm the Kingdom for themselves against the King, and lastly demolish the Church by abolishing Bishops, Deans, etc.

For the first, the King left them unconstrained, and deserted Westminster whither they were suffered to attend him, and after took arms to dissolve them. But those arms being now broken, the Parliament keeps him from raising new broils but so far are they from refusing to treat with him that they prepare propositions for him and reject no messages or letters that come from him, neither is the King's restraint properly to be called imprisonment being much different therefrom both for the manner and for the end of it—the manner of it is ingenuous and accompanied with many accommodations which thousands

of other Freemen—nay Gentlemen of England—cannot attain to, and for his attendants they are truly his servants and as observant in all offices compatible with the peace of the Kingdom as ever he had any. The end of his restraint also is not to incommode him in any degree, there is nothing aimed at in it but to preserve the Kingdom from new disturbance, till he appears fully reconciled and to preserve him from drawing prejudice upon himself. For the second, since 'tis not for the Kingdom's damage nor the King's, that future commotions be suppressed, the Lords and Commons could no way better satisfy the intent of their summons than by suppressing commotions by the same posture of defence as they now are in. I could wish also that Mr. Jenkins would understand that as the Kingdom is called the King's, so the King is called the Kingdom's and that propriety which the Kingdom has in the King is more tenderly to be expounded than that which the King has in the Kingdom. For the third, that the word Church should only be applied to Churchmen or the word Churchmen to Bishops, Deans, etc., is more than the Law teaches, and if the business be studied well t'will not be found a thing impossible, as Master Jenkins supposes, for the Parliament to abolish Bishops, Deans, etc., and yet to advance Churchmen, or to take away some of the excessive grandeur of Churchmen, without any destruction to the Church.

2. Thus much for Mr. Jenkins' reply to the first particular. I come now to the second where he takes it ill that in cases of pardons the King should be

thought to be virtually in the two Houses, for inasmuch as that power, he says, remains solely in the King and cannot therefore rest at all in the two Houses.

That the power of pardoning delinquents is so in the King, solely, as that he cannot derive the same to the Parliament, as he does his other power, is not proved by Mr. Jenkins nor can it be possibly proved, and that the King does not derive the same (as he does his other) is as far from being proved also, for doubtless in all acts of oblivion the two Houses convey an additional vigour and so make the acts more virtuous than the King's mere act could do, and therefore this new vigour which is conveyed by the Houses, if it be not that which is derived from the King, as Mr. Jenkins' tenets deny, then it flows naturally and originally from the two Houses : and what can Mr. Jenkins' cause gain by this ? But, says Mr. Jenkins the King is a prisoner and so having no power, but what is divested by his imprisonment, the power of the Houses is usurped by themselves and not derived by the King. The block which Master Jenkins here stumbles at is this. He thinks an imprisoned King has no power at all, or remains indeed no King, but this is not absolutely true of all Kings imprisoned, for, as our case is, either imprisonment is something more than that which our King suffers, or else imprisonment as to some acts may stand with freedom as to other acts. I have touched upon this subject already. But let Master Jenkins be as bitter as he pleases in his censures and reproaches 'tis not intended by the two Houses that the King should be disabled from

doing any acts of justice and piety, 'tis only from raising new Forces, and begetting new concussions that this new guard desires to prevent him. Master Jenkins next says that the King may revoke and discharge his commissions at pleasure, but what of this? The question is whether or no the King may frustrate and elude his commissions; and this Master Jenkins speaks not directly to. We need not quarrel therefore, further, about this: we will grant to Master Jenkins that Parliament may be justly determined and dissolved by our King, provided he will grant to us that the same may not be frustrated or eluded. But Master Jenkins stomachs much at our calling the two Houses, a Parliament, and censures it in us as a great delusion although we know well that nothing is more common in speech than to say that the King calls his Parliaments, writes to his Parliaments, dissolves his Parliaments, etc. The King must be taken, abstracted, from that which he calls, writes to, and dissolves, or else we must consider him calling himself, writing to himself, and dissolving himself which cannot be without absurdity. Besides, when we speak of the great Council of the Kingdom we mean the Parliament abstracted from the King, forasmuch as the King in Parliament does not so properly give as receive counsel, and why we may not as well call the two Houses a Parliament as the Great Council, threefold Court, or mickle-gemot of the King and Kingdom, I cannot devise. The Law says the King cannot be absent from his Parliament: this must be meant authoritatively, nor personally, for divers of our Kings

have been in France when Parliaments were sitting here, and yet even they were politically present, though physically absent, as Master Jenkins himself must needs grant. Now if the Parliament be the King's Court or Council and such a Court or council as he cannot virtually be absent from, though in person he be often distant, and at some time must not be otherwise, how can it be maintained by Master Jenkins that the two Houses are not the Parliament? Another objection of Master Jenkins against the two Houses is that they were deserted by divers of their own members, who in considerable numbers went to the King at Oxford, but this is no other objection than might be made against the Husband when the Wife elopes and withdraws herself: Shall that party which remains constant, and attends duly at the place assigned in the summons for transacting of that business which was therein specified, suffer for that party's sake which proved inconstant, and neither observed the place nor business of the writ by which it was convened? surely this is most unreasonable. Doubtless when the King called these uncertain members 'mongrels,' who together with their whole faction could neither be cordially true to Religion and Liberty at London, nor totally consent to subvert them at Oxford, he had more reason on his side than Master Jenkins has, who disparages those that kept their stations because of the defection of their mongrel brethren. In the last place Master Jenkins, though he confesses that the Common Law did always restrain our Kings from all tallages and subsidies but by consent in Parliament

as doth appear in Magna Charta—yet, he says that this is no consequence, because the King cannot take the subjects' goods at pleasure therefore the Commons have a concurrent power with the King in Parliament: indeed this consequence is ill framed, but in its right form it appears thus :—if the Commons in Parliament have that great power to raise treasure out of the whole kingdom, which the King has not out of Parliament, then they must deduce this power from themselves, or those whom they represent, and not from the King, who cannot give that which he has not in himself, but so it is that the Commons have this power—ERGO—If Master Jenkins will answer this he will befriend my intellect.

The last objection which Master Jenkins makes against this concurrent power of the Commons in granting subsidies is this, that Parliaments may be held, and be complete Parliaments without subsidies and hereupon he tells us that former Parliaments rarely granted any unless in time of foreign wars, and Queen Elizabeth refused a subsidy granted and King James in his first year had none granted him. Is there any solidity in this objection ? I appeal to all ingenuous men, Parliament may be without subsidies, ergo—the granting of subsidies is no act of power in Parliaments, or thus, the giving of subsidies is an act of power in Parliaments, but since, at some time, it may be disused or intermitted, or a power that at some time or other is not reduced into acts—therefore it is no power, or not inherent in the people, but only derivative from the King. Let Master Jenkins apply his

own words to himself here, for, certainly, he ought to make a conscience of blinding the people with such untrue colours to the ruin of King and Kingdom.

3. The third particular now offers itself in order—and here Master Jenkins in his reply ought to prove that if the two Houses had a Parliamentary power in themselves they needed not send propositions to the King, but instead of opposing this (which was the only thing made good by his answer) he diverts his force to oppose the equity and justice of the propositions sent to his Majesty. This is not to reply to his Answerer, but to satisfy his own peevish disposition, yet, since he may abuse the people as well when he rails, as when he argues, something must be returned in answer to him.

After he has magisterially condemned the Propositions in general as being contrary to law he vouchsafes, at last, thus particularly to interrogate us. Have the two Houses a strict right to lay upon the people what taxes they judge meet? Have they power to pardon all Treasons, etc., sub intelligitur without the King's consent? We answer that they have not any such ordinary power, but if the Kingdom's safety lie upon it, and the King will not concur in saving the Kingdom in an ordinary way they may have recourse to extraordinary means for the saving of it: ordinarily the people may not take up arms but in the case of extraordinary invasion by foreign or domestic force they may justify the taking up of arms, and when War itself is justifiable all the necessary concomitants and expedients of a politic war are justifiable. Nature has

confined water to a descending course yet not by such a rigid law but that for the necessary subvention of the whole fabric, and for the avoiding of that vacuity which Nature more abhors than the dispensation or temporary suspension of such or such a particular inferior law, this ponderous element may forsake its ordinary course and mount upwards. In a village where houses stand scattered and remote 'tis not lawful for me to demolish this House because that which stands next is all of aflame, but in a city this is lawful where the Houses are so conjoined that the flame of one house may extend itself to the consuming or endangering of a whole street or more. It is not generally lawful for me to judge my neighbour unheard, or to execute my neighbour unjudged, yet if I find my neighbour engaged in such a Treason as "Fawkes" was, and ready with his match to give fire to such a train of powder as he had laid, and have no other means to prevent him, I may run upon him with my sword and make myself both his Judge and Executioner. Now if Master Jenkins will say that such extraordinary acts as these are warranted by law, I shall comply with him, yet I conceive 'tis not upon any particular law, but upon the general law of public safety that these warrants are grounded upon, and if I am not mistaken 'tis rather policy than law that admits of such strange deviations from the common practice and rule of Law. But, says Master Jenkins, these propositions cannot pass into Statutes but by the King's concurrence, and has not the King a free power to assent, or dissent, in those things which must receive their being from his

concurrence? or is the seeking of the King's concurrence nothing but a mere compliment? We answer, the King hath a power to assent and dissent, yet without any impeachment of his liberty he may, nay, he must assent to such Bills as are for the public good, and to dissent from such as are tending to the public detriment. The reason is because the free choice of the King is to receive its determination from without, from the matter of the bills, not from within, or from the propension of his own will, for the will enjoys a more perfect liberty when it is attracted, and, as it were necessitated by that object which is good, than when it is left to its own equilibrious motions, and so wavers indifferently betwixt good and evil. If it be said that in the choice of that which is good the King cannot so well satisfy his own judgment by the advice or reason of other men, as by that which is dictated to him by his own breast, it must be answered first in the grand concernments of the Kingdom wherein the King has not so great a share as the people have 'tis more just that the reason of the two Estates be satisfied than his. Secondly, in cases where the King is severally interested his particular interests ought to succumb and give a preference to the general, thirdly either the matter in debate is intricate, and admits of doubts or not; if there be doubt in it, then the King ought not to oppose his single judgment, or rather opinion, to the resolution of the highest Court and Council of the Kingdom. If there be no doubt in it (an accident sure very rare that the Lords and Representants of a whole state should judge a thing to be advantageous

when the King knows it certainly to be disadvantageous) then the King is to consider whether the matter in question be necessary or expedient. If it be expedient only, then the King ought not to contest about it, forasmuch as that contestation may be more inexpedient for the State than his concession. But if it be necessary (as the cause of true religion, etc.) where the King being orthodox knows his subjects to be blinded with Idolatry or Heresy and cannot without sin, give his Royal assent to such irreligious bills as they present, then, as it were impious in him to sign them, so 'tis outrageous in him to disturb the public peace about them. The reason of this is because Politicians guide themselves rather by the calculation of what is probable, than what is possible only, and therefore though it be possible that a King with one eye should see more than a Parliament with many, yet, since this is not probable, there is scarce any State but chooses rather to be swayed by the counsels of many, than by the counsel of one, and where the counsel of one claims a prevalence above the counsels of many 'tis not obeyed without great reluctance commonly and public disturbance. Besides, if one man's eyes see more, perchance, than the eyes of many (as is very rare, though not impossible) yet 'tis very strange that that one man's discovery should not open the eyes of other standers by without force, in respect that light is a thing lovely to all, and ready to be embraced upon the least glimpse of it, and a very little thereof being let in through a narrow cranny, may make all that is contained in a very wide room visible, and if one man

possibly in things different should see more than many, yet 'tis very near to an impossibility that one man should apprehend truth more than many, where that man has more prejudice against the truth by self interest, than the many. And who can doubt but that Princes, as Princes, are more drawn by the bias of self interest against that which is the good of the community than the Court which is not only by virtue of representation, but even naturally also, in some degree, the community itself? The root sends juice and nourishment to the branches but expects none back from them, and the Father's love is strong towards the fruit of his body, but weak and virtueless is the flow of that juice which falls from the branches to the root, or of that love which the son refunds upon his progenitor, and, even so, it is in the relative offices of Prince and Subject; the Prince looks less tenderly upon the people as being his root or parent, whilst yet the people look more tenderly upon the Prince as its own stem and issue, hence it is that all States are accounted more or less slavish as their Princes are more or less arbitrary in their supreme councils, and all men are accounted more or less miserable as they are more or less slavish. What became of Rome after it was once yoked by the Caesars, who might arbitrarily waive the advice of the Senate and consult with Slaves, Eunuchs, Women, Panders, etc., or what brought us all to our late bloody catastrophes but the discountenance and detestation of Parliaments? Ask Lord Digby himself, and even his speeches made in Parliament, since November, 1640 will inform us, that there were many causes of

our miseries, but the cause of all these causes was the abandoning of Parliaments. Sure the Lord Digby may pass as an authentic testimony for our side, and yet even the Lord Digby, before he turned Courtier, had the ingenuity to resent this Kingdom's servility, when a Woman of a false religion, hostile nation, and adverse affection, together with her Jesuitical train, had more predominance in our public affairs than the two Estates assembled in Parliament. But Master Jenkins will still say that the King is assisted with his Judges and other council both spiritual and temporal and that the House of Commons in some debates may be divided into two or three odd voices, and therefore why may not the King so assisted be better advised than those two or three odd voices. This is an old objection and seems plausible but is easily answered. For 1. It is very unequal that a few Councillors whom the King chooses should be preferred before many whom the Kingdom chooses in those matters which import the Kingdom more than the King. 2. If the King's council in the House of Peers were equally to be valued with the House of Commons yet still so long as it is left arbitrary to the King to follow their advice, or not, the Kingdom is in the condition as Turkey is, where the Grand Seigneur is left only to consult with himself or any of his concubines or eunuchs. And lastly, there can be no lower or baser degree of slavery imagined than for a nation to be subjected to a Lord that is so absolute in the highest results of State, as that he may use no Council, or make choice of what council he pleases.

I haste now to the fourth particular where Master Jenkins affirms again that the two Houses do separate the King's power from his person as the Spencers did, and from thence frame the same three condemned conclusions as they did. The separation of his person from his power is proved partly by imprisonment of his person and partly by usurping all his power, for Mr. Jenkins tells us that the two Houses counterfeit a Seal of their own, and thereby seal writs, make Judges, and settle Courts and this is done contrary to the King's consent not declared only by letters, ministers and word of mouth, but by his true great seal of England.

It is here (1) to be noted that Master Jenkins does now distinguish betwixt that which the King declares by word of mouth personally, and by Letters and Ministers extra-judicially: and that which he declares legally by his Writs, and judicially by the Great Seal, and this is a plain confession that the King's person may urge one thing and his office another: that his personal command may be unjust and not to be obeyed at the same time that his regal command may be just and necessarily must exact obedience. It is to be noted—That the reason alleged why the King's commands in this war are legal and just, not personal and unjust, is, because they were authorised and fortified with the true Great Seal: and what is this but to proclaim (*a*) that the Great Seal of England is solely at the King's disposal to be employed according to his mere discretion. (*b*) That the mere annexion of the Great Seal makes any act of the King legal and authentical.

(*c*) That Master Jenkins is better able to judge of the two Seals which is the true one, than are the two Houses of Parliament. When Mr. Jenkins will be as learned in proving, as he is audacious in presuming these new quaint points we shall know what to answer. In the meantime we will expatiate no further than his discourse leads us. As for the imprisonment of the King's person we have answered that already and forasmuch as the keeping Chaplains from him is objected we answer thereunto, that not Chaplains but such and such Chaplains, viz., such as the State judges to be Incendiaries are denied, and there is no more injustice in restraining such Incendiaries than in restraining Commanders and Arms—Now to parallel the Houses with the Spencers, Master Jenkins says, that they have declared his Majesty to have broken his trust touching the Government of his people; they have raised armies to take him; they have taken and imprisoned him; they govern themselves; they make laws, impose taxes, make Judges, Sheriffs and take upon them omnia insignia Majestatis, and is not this, says he, to remove the King for misdemeanours, to reform per asperté, to govern in aid of him—the three conclusions of the Spencers? Mr. Jenkins here, as if he had abjured all ingenuity, confounds diverse things which he knows to be exceedingly different in nature, for (1) he takes no notice whether the force which has been used by the Parliament be offensive or defensive and yet none can be ignorant how many things may be justified in a defendant which cannot by the offendant. (2) He distinguisheth not betwixt

that force of the Defendant which aims only at a temporary securance against the assailant and that which proposes to itself vindication or reparation by the total removal or destruction of the assailant. He knows well that the Spencers aimed at a total dethronization of their Master, whilst this Parliament aims at nothing but the beating down of that sword which was drawn against them. (3) That the Spencers intended to levy offensive arms for reforming that in their Master per asperté, which was not so dangerous to their persons or their lives, as that which has been contrived and enterprised against this Parliament, for not only a party of 300 armed men to seize and tear five principal members out of the House (and, by consequence, to menace all that retained any freedom in them) but Armies were solicited to attempt against this Parliament before they thought of any force, and this is far above those provocations which were pretended by the two Spencers. (4) The Spencers by pretext intended to oppress all the nobility, gentry and commonalty of the land, but this is impossible to be suspected in a Parliament which consists of the choice of, and are in themselves, a considerable part of all these.

The fifth particular now offers itself wherein Master Jenkins maintains that every King of England (and only the King in England) can grant pardons, and that in all cases, and for this he cites Stanford's pleas 99. It was not, nor is denied to Mr. Jenkins, that the Kings of England have power to pardon delinquencies, so far as themselves are parties suffering.

But the question is whether the Kings of England only can, and always can, pardon delinquencies; and whatsoever Master Jenkins thinks of the authorities, Stanford and Dier are not full to prove the affirmative, and certainly if it were 'proprium quanto modo' for the Kings of England to pardon in all cases, it were very improper for general acts of indemnity to be passed by all three Estates, 'frustra fit per plura, quod fieri potest per pauciora': if one of the Estates be sufficient to what purpose do the other two concur? Secondly all remedy by appeal would be cut off from subjects, for either my appeal must make void the King's pardon, or, if the King's pardon be not void in this case, and as to this murder committed, my appeal must be dismissed. It had been candid in Mr. Jenkins if he would have replied something to this objection about appeals, for now it may be supposed he replied nothing therein, because he could reply nothing to the purpose, besides, if the King's pardon cannot frustrate my appeal (as Mr. Jenkins knows well, it cannot) why should the same destroy the remedy and justice that is due to a whole State? Treason may be committed against the State as well as against the King, even as murder may damnify me as well as the King, and shall it be held less contrary to justice that the State should be deprived of its remedy by the King's pardon, than that I should? Good Mr. Jenkins' policy is not to be superseded by law, but law is to be improved by policy, and as in quiet times and private cases 'tis safer to follow Law than Policy, so in times of troubles, and in affairs of general and

great concernment 'tis safer to observe Policy than Law. The same may be said of not pardoning, for doubtless the King has as much latitude to refuse, as to grant pardons, yet, when his power in either may be mischievous, his power in both must submit to reason of State, and law is not violated, but better improved, when true reason of State takes place above it.

I am now to proceed to the sixth particular where Master Jenkins will not endure that the King shall be said to retain the right and habit of governing at the same time when he is said not to be actually in a condition to govern. He intimates that the Law makes no such distinction and infers ' ubi lex non distinguit non est distinguendum ': by this it should seem it is not allowable that a Lawyer should make use of any distinctions, for which he has not some book of authority, though the difference of things be never so pregnant. A miserable confinement to Lawyers, and sure, four or five hundred years past, if lawyers had been so confined we had now left us no prints of any distinctions at all. All other scholars besides Lawyers —nay, all Lawyers, that are not mere Lawyers (I mean by mere Lawyers such as have made no improvement of their reason by Logic, Policy and other humane literature) are of a contrary opinion, and hold it more true, " qui bene distinguit, bene docet." But what a ridiculous thing is this, because Henry VI lying in his cradle, not able to speak, write, read, or do any act of power, has a right to govern, therefore I must grant he is in a condition to govern, for fear of dis-

tinguishing when the law does not distinguish? So of Edward II and Richard II because they had a right to the Crown, in that moment of time when they abdicated the same, and pronounced themselves unfit to govern, therefore I am obliged to believe that they were not abdicated, nor made unfit for government. Next Mr. Jenkins likes not this distinction that the King is not barred simply from returning to his Parliament, though he be barred 'secundum quid,' that is, from returning unreconciled, or armed against his Parliament. He professes that he and the whole city knows the contrary. How the City should know the Parliament's intentions so exquisitely, or Mr. Jenkins be assured of the City's knowledge so infallibly, I cannot imagine, but I wish Mr. Jenkins who takes upon him to be a Priest as well as a Lawyer by virtue of Justinian's Commission, were such a Priest indeed, as that we might expect nothing but knowledge and truth from his lips.

The seventh particular comes now in order where Mr. Jenkins puts us in mind of the oath of supremacy taken by all members of the House at their first sitting, and asks H.P. why he styles the King supreme governor in all causes and over all persons and leaves out "only" supreme! Surely not to detract anything from the King's celsitude, but because the word seemed superfluous—for he that swears the King to be supreme over all persons, swears him to be only supreme over all persons, inasmuch as there cannot be more supreme persons over all than one: but away with these frivolous logomachies. The argument runs

thus:—if the King be only supreme Governor in all causes, then in Parliament causes, if over all persons, then over both Houses, and if so, then how is he become a prisoner, and how do the Houses act by virtue of their prisoner's writ? It was answered before that the King is granted to be supreme, or only supreme over all persons but yet still not ὑπὲρ νόμον above or beyond the law, and not beyond that community for which, and by which, the Laws themselves were made. The Duke of Venice (the like may be said also of all elective conditionate Kings and Potentates) has no person in any cause whatsoever superior or equal to him, yet he has his bounds set him by the law, and as the law is above him whom it bounds, so that power which can make and alter law in Venice, is above the law itself. Mr. Jenkins himself confesses that the King is not above the Law, nor above the safety of the people, but in regard that the King is supreme in all causes, as well Parliamentary as other, and over all persons, as well the Lords and Commons in Parliament as others, Mr. Jenkins supposes there is no other Judge of the Law, and safety of the people but the King, but this is not to be admitted by us, because we know well, that whosoever is the Supreme Judge of the Law, if not directly, yet he is consequentially above all laws, and whosoever is above all law cannot be restrained by the safety of the people though the most sublime of all laws. Wherefore, if this be admitted true of our King, that he is supreme Judge of Law, then it must follow that the subjects of England have no more assurance of law or safety than

what is founded only in the King's breast and discretion ? For the King's being a prisoner, that has been already answered, and indeed it is more truly said that his hands are held and dis-weaponed, than that his feet are fettered, or his head undiademed. Then for the Parliament's acting by the King's writ, there ought to be some mistakes cleared therein also; for we do grant that the writ is the King's, the Great Seal is the King's, that Officer which has the custody thereof is the King's, the people are the King's—but we do not grant that any of these are so the King's, as that they are not the Kingdom's also in a more eminent degree—for as the Husband is the Wife's truly, but not so eminently as the Wife is the Husband's, so the Kingdom is the King's, and the King is the Kingdom's, yet the Kingdom's interest and relation is far more valuable and sublime.

The last particular now offers itself in the close of all and here Master Jenkins does not deny expressly that many things may be good in Law notwithstanding that some formalities or those things which we term 'apices juris' are wanting—for doubtless where two laws are and both cannot be fulfilled, the less important, though it be more particular, must give way to the more important law though more general, e.g., when the King dies, by the Common Law in force—Parliaments cease, all Judges, Sheriffs and Officers not absolutely necessary, etc., return to a private condition and so remain till new commissions are obtained; but if the new King happen to be beyond sea, as at the death of Henry III, so that new commissions cannot be immedi-

ately granted, and thereupon the greater law of public safety is brought into competition with the law of an inferior nature, a new seal may be made, new Judges and new Officers may be created, and either a former Parliament may be continued or a new one summoned, and all necessary points of complete administration may be expedited, as in probability they were before the arrival of Edward I. God did not make any particular dispensation, his shewbread might be eaten by common persons if in distress, or the golden vessels of his Temple aliened, when the City was to be redeemed from the insolence and rapines of a prevailing enemy. The general law, of necessity, was sufficient to warrant both the one and the other, but I will press this no further since Mr. Jenkins alleges nothing to shew why a Parliament which cannot deliver itself by an act, may not use means to deliver itself by an Ordinance. I will not insist further hereupon. But instead of disputing, Mr. Jenkins seems to jeer at us for setting up excise, raising arms, taxing the people, imprisoning the King, abolishing the Common Prayer Book, selling Church lands, etc., and in an irony he concludes, "that all these are in order to public justice and safety." Mr. Jenkins here leaves us upon uncertainties whether he condemns our cause because it required such props, or only these props, because they assisted us in promoting so bad a cause. If he allow of the ends, but not of the means—if he allow that we may defend the laws, and safety of the State, but not by arms, or if he allow of arms but not of taxes, etc., he must renounce rule natural as well as logical "Qui

dat finem, dat media conducentia ad finem." If he allow of the means, but not as conducing to such an end upon presumption that our laws and the state are not endangered, or if he prove that they may not be defended, he takes upon him more than is due—for his part is to plead, not to judge, and answers might be given to his pleading, but nothing can be said to his judging.

I conclude therefore with the Lord Coke's censure of Treason, as Mr. Jenkins does, and am of the same opinion, that Treason ever produces fatal and final destruction to the offender, and never attains to its desired ends and wish that all men for this cause would serve God, honour the King and have no company with the seditious. Yet let me add this, we have neighbours now in the Netherlands that lately have revolted from their Master, and yet prosper and flourish beyond all in Europe. The justice of their revolt may be questioned by some, but I, for divers reasons, do not question it, and one amongst the rest is this, of the Lord Coke's, because I think an act merely treasonable cannot prosper.

THE POWER OF KINGS

DISCUSSED IN ANSWER TO SEVERAL TENETS OF MR. DAVID JENKINS, BY WILLIAM BALL, OF BARKHAM.

Sat patriae Priamoque datum—

[Mr. Ball, like H.P., of Lincoln's Inn, stepped forward to combat the tenets of Royalist Judge Jenkins. He wrote pamphlets, and was connected probably with the family of the astronomer of that name and period. He may have been a clergyman. He tells us he was not a lawyer, nevertheless he possessed a broad, philosophical grasp of its principles and limitations. It will be seen that he makes use of the words "Cabinet Council" about a century before such a body came into existence.—EDITOR.]

THE free-born people of England live, or ought to live, by or under a law of common consent, the supreme ruler or highest magistrate whereof is the King, whose oath is to conserve and maintain, 'justas leges et consuetudines quas vulgus elegerit,' etc., the just laws and customs which the common people shall choose (as many do expound it). Others will have the verb elegerit to signify hath chosen, according to the French "auran choisy," and Mr. Jenkins allegeth this reason for it, in one of his publications, "customs cannot refer to future time and both are coupled together, law and customs, so that elegerit must be taken in the preterperfect tense. But, by the favour of Mr. Jenkins albeit customs are not properly alterable, as

are laws, and though laws and customs are coupled together, yea, alterable laws are nominated and placed before customs, yet may the verb elegerit be taken in the future tense, for the reason why laws are inserted in the King's oath, or propounded to the King in his oath, before customs, is, first, because laws are more worthy and noble than customs, for that laws are rules or regulations of the whole or entire people but customs are only of some, or a part of the people, and that in some things only. Secondly, laws are more ancient, to speak generally, than customs, for it's very probable that the Saxons, coming out of Germany into Britain, brought the common law with them, as a rule agreeable to the law of nature and reason, which they had learned or had delivered unto them from their fathers, yet customs they could not bring with them, for customs have relation to place as well as to persons, but neither the Saxons nor any other people could have relation to a land or country before they possessed it: so that the coupling of laws and customs together, or nominating or placing laws before customs in the King's oath is no amiable reason, from whence a direct consequence may be deduced, that the word 'elegerit' must or ought to be taken in the preterperfect tense, or that it may not be taken in the future tense, and consequently that the King may not be strictly tied and obliged, in foro conscientiæ, to conserve and maintain such just laws as the common people shall at any time make choice of. But admitting the verb 'elegerit' to be taken and expounded in the preterperfect tense, albeit there be difference in grammar,

yet, is there no great difference in logic or reason for the King taking his oath to maintain the just laws and customs which the people or common people have chosen, taketh his oath by an implicit or tacit condition, to conserve and maintain the just laws which the people shall choose: for at the first making of that oath, and at our Kings their taking of it ever since, the common people had then chosen, and have ever since conserved such choice, that not only there should be no laws de futuro for the time to come, without their consent, but also that upon their request or petition our King should redress such grievances as they should complain of, and likewise propagate such just laws as they should propound, conducing to their general good or welfare: and that was the reason why heretofore it was inserted in many statutes " Be it therefore enacted by the King's Majesty, with the assent of the Lords, etc., and at the request of the Commons, etc." wherein two things are to noted, first, that the Commons did request, not command or enforce our Kings to pass such acts: secondly, that our Kings did, upon such requests, usually pass them. And albeit the King have a negative voice, or rather a voice for advice, or to advise, as the words le Roy s'avisera import, yet I conceive that he is strictly tied, in foro conscientiæ—according to his oath, and the end of his government (which is the good of the people) to pass such acts for civil government as the Commons shall request him to pass. But Mr. Jenkins and others make a query and ask who shall be Judges ? Whether such laws as the Commons shall request be just or no, the King is

tied and obliged by oath only to propagate and maintain the just laws which the common people choose or request. In Mr. Jenkins' opinion, the Judges and Masters of Chancery with the Lords or Peers assisting the King, ought to be judges of the common people, or of their representatives or trustees, their requests, rather than two or three, or a few commoners who sometimes are not learned in the laws of the land. To this query and the allegations, I answer, that the Commons 'primario,' or in the first place, are, and ought to be the judges, even as customary tenants are, and ought to be their own evidences. Although one man ought not to be judge in his own case, yet all in a Kingdom or Commonwealth can have no judges of their common interest but themselves, or some amongst themselves, and where the common interest is controverted, there they who have the greatest interests or whom it most concerns, ought to be Judges primario, and surely the common people in general have the greatest interest in their common interest and the laws of the land most concern them. And as touching that many in the House of Commons are not sometimes learned in the laws, nor have any great knowledge in State affairs, it may be so, and it may be wished that none but such as have sound judgments might sit in that honourable House and I believe that the words 'habiles homines,' in the writ of burgesses, intend such men, and not men of great estates, who are sometimes men of mean understandings and yet, by feasting (I will not say bribing) or by flattering, or by an over-awing power attain to be Parliament men.

Howsoever, for as much as such men, being chosen, are capable to consult and advise with others wiser than themselves and are in matters of great concernment guided by the direction of others, their votes going along with the votes of others, they may be accounted competent judges of what may be beneficial or prejudicial to the common wealth. Howsoever I do not exclude the Lords or the House of Peers from being judges secundario of such matters as generally concern the Kingdom, for although Mr. Jenkins conceives them not to be vulgus, truly I conceive the Lords in England to be but vulgus superlatum, even as Bishops are but clerici prælati, and aldermen but cives elati. In England the nobles have no distinct or different laws as in Germany, Poland and some other countries—these here inherit by the common law, or laws common to others: they also contract, bargain and sale by the same laws and are subject to the same laws. Some privileges they have which make rather a titulary or circumstantial than an essential or specific difference between them and the inferior common people.

But it may be some will say, why should not the Lords, being dignified or noble, be judges primario, or in the first place, rather than the Commons? I answer that the Lords are not entrusted by the people as are the Commons and therefore in matters of general concernment the Commons ought to precede them, notwithstanding, de se et suis, in things that merely concern the Lords, as also concerning matters of fact or controversy which shall happen by writs of error

or otherwise, to come into that most honourable House therein the Lords, de jure, precede the Commons. But Mr. Jenkins will have the House of Peers to be judges of the laws rather than the House of Commons because the King by his Writ saith that he will consult and treat with the Peers and Prelates of the Kingdom for and touching the great concernment of the Commonwealth and the King never sits in the House of Commons. The Peers do "consulere," and consequently (as saith Mr. Jenkins) judge of the concernments of the Commonwealth.—The Commons do but 'facere et consentire' according to such consultation or judgment: which power 'ad faciendum et consentiendum' Mr. Jenkins saith, the King gives them by his Writ and to strengthen his opinion he quoteth a great Lawyer. But by the favour of Mr. Jenkins and such as adhere to his opinion, albeit the King say in his writ that he will consult and treat with the Prelates and Peers, touching the great concernments of the commonwealth, for that they are properly his assistants, he sitting with them, doth he therefore say that he will not treat with the commons? Nay, doth not the King treat with the Commons by messengers when he desireth aids and subsidies, and have not the Commons a negative voice therein? Can the King and the Peers make an act of law without the Commons? Are the Commons tied or obliged necessarily to do and consent to what the King and the Lords shall determine, as Mr. Jenkins seems to intimate? Surely no—our laws and customs speak them absolutely free in these things. And

whereas Mr. Jenkins saith that the King, by his writ, gives power to the Commons 'ad faciendum et consentiendum,' therein he is greatly mistaken. The King by his writ only appoints the place and time and instances the words to shew the cause or end of their convention or assembling together, but the people give them their power, who elect or nominate them, and also transact their power unto them, by their parole, at their elections, and by their indentures, wherein they insert the words 'ad faciendum et consentiendum, as from themselves to the parties whom in the said indentures they nominate and entrust. And indeed were the power of the Knights, citizens and burgesses derived to them by the King's writ, such indentures were needless and frivolous. The sheriffs might only make their return "se fecisse electionem secundum breve receptum" and such like. Moreover, it is against reason that a people shall have power to nominate and entrust some about their affairs, and shall, for that end, allow them wages (as do the counties, cities and towns corporate to the Knights, citizens and burgesses) and yet that such Trustees or stewards should derive no power from the people, their trustors, neither as their judges delegate nor allegate: that is to say: neither as judges for them according to law, nor as judges for them according to reason and conscience. But Mr. Jenkins conceiveth the House of Commons to be no fit judges of law, or acts for the people's good, because they are not called 'ad consiliandum' but the House of Peers only. And furthermore that the House of Commons is no Court,

at leastwise no Court of Record, nor can give an oath, nor examine upon oath and that House which cannot do the less cannot do the greater.

By Mr. Jenkins, and other, his adherents' favour, is it not of greater moment and concernment to be called 'ad faciendum et consentiendum,' than 'ad consiliandum, or consilium dandum'? He or they who are called to counsel are called only to advise with, but he or they who are called ad faciendum et consentiendum are called to act with, or to be co-enactors. Therefore the King by his Writ invites the people to do and consent (by their representatives) touching such difficult and urgent affairs as concern himself, the State, and defence of the Kingdom of England, and Church of England, of which he intends to consult with his Peers. And great reason it is that the commonwealth should, at the least, have free power in herself to acknowledge her own "finalem concordantiam" her own "facere et consentire," albeit she were in nature of femme covert baron (as Mr. Jenkins would have her). The King being sponsus regni, qui per annulum (see Mr. Jenkins Lex Terræ) is espoused to his realm at his coronation. And certainly the King conceives such power inherent in the Commonwealth when he declares in his Writ: ita quod pro defectu potestatis hujusmodi, seu propter improvidam electionem militum, civium et burgensium, etc. Moreover, I could tell Mr. Jenkins that Commonwealth hath greater power. The King receives the ring at his Coronation, as doth femme covert baron, and consequently the commonwealth rather espouses the King, than the

King the Commonwealth, so that the commonwealth is regina sui ipsius, the King rex regens, as was Philip the Second of Spain in England, albeit modo differente: for he was King merely of courtesy but our Kings are kings by descent. And whereas Mr. Jenkins doth in several places except against the power of the House of Commons, affirming that they are not fit to be judges of the laws of the land for that they cannot punish felony nor treason, nor give an oath, nor are a Court of Record, etc. It maketh no matter whether they can do these things, or whether they are a Court of Record or no, in relation of their being judges of the laws of the land, so far forth as they are to judge of them, for the Commons are not called and chosen chiefly to judge of matters de facto, according to the laws in being (for as to that, the Courts of Justice may determine of) but to judge of the laws themselves de facto et de fieri, whether they be convenient or inconvenient, fit to be continued or repealed, or whether new laws ought to be made for the good of the Commonwealth or no: and these things they may do as judges allegate or umpires for the people although the House of Commons were no Court of Record. Moreover I conceive that he, or they, who covenant with others to do any act, or acts, which shall be reasonably advised or devised by the covenantees, or their council, or the like, doth make such covenantees their council, or arbitrators, judges primario, of such act or acts, and such covenantors make themselves, or become passive to the end, and active to the means of such covenant: that is to say, they are to do or act what the covenantees

will (with reason) have them do or act, albeit the acts which they do are their own acts. Even so that potentate who covenanteth by oath (for his oath is vice contractus vel compacti) to conserve and maintain the just laws and customs which the people have chosen (it being one of their chosen laws that their potentates shall, de futuro, upon their request, redress their grievances, be it by repealing acts inconvenient or enacting some de novo) such potentate doth surely make the people, their representatives or Trustees, judges primario, or in the first place, of such act, and makes himself, or becomes passive to the end, and active to the means of such his contract by oath, that is to say he is to do what the people will (with justice and reason) have him to do or act, albeit the acts which he doth are his own acts.

But Mr. Jenkins saith that both Houses have many times tendered unto our Kings, unjust and unreasonable bills, which it had been better for our Kings to have denied, or not to have passed, than to have consented to, and have passed: and Master Jenkins instanceth, touching religion, bills tendered to Henry VIII and to Queen Mary: bills tendered unto Richard III and also the aforesaid Henry VIII concerning Civil Government, etc. I conceive Mr. Jenkins might have instanced enough and too many such bills: but what of all this? Is there not "bonum reale" and "bonum apparens secundum tendentiam velleitatis," real good and seeming good which may be in itself evil? And is there not "verum reale" and "verum formale secundum quod ad se fert

intellectus," a real truth, or a true real being, and an apprehended truth, or a true apprehended being, which may be no true real being. Even so there is "justum reale," and "justum apparens" or "formale" an act, or being really just, and seemingly or formally just, as it is apprehended by understanding and embraced by the will, which may be in itself unjust. Wherefore, if the people (to whom the King is tied by oath) or their representatives or trustees, so long and so far as they instruct them, shall, on behalf of the people, tender to the King a bill of civil government, to them seeming just and reasonable, but to the King seeming unjust and unreasonable, and it may be so in itself, the King, notwithstanding, is, by an implicit condition of his oath, tied, or obliged to pass such a bill, if it deprive not himself of his own just rights, for, 'id juris est quod nationis est,' if a nation will induce themselves into an inconvenience, conceiving it convenience, the King cannot help it. He may use the best means he can by advice, arguments, and the like, to prevent it, but if the people, and their representatives will persevere in their desire or request, the King, as aforesaid, is obliged to pass it. The King is the supreme ruler, or highest magistrate for the people, or over the people, ad agendum, to put the laws in execution, but the King is not chief judge of the rules or laws by which the people will be governed: the people themselves and those whom they entrust, so far as they entrust them, are, or ought to be, judges thereof, jure primitivo. Moreover, if a covenantee will desire or require of a covenantor an

act (of which the covenantee is judge primario or in the first place) no way beneficial, but rather detrimental to him the covenantee, the covenantor is obliged to grant or perform such an act, tending to the end of his covenant, not otherwise to endamage himself. Even so it is between the King who is Covenantor by oath, and the people, who are covenantees, concerning laws and statutes touching civil government to be enacted or repealed and abolished.

But some, it may be, will say, suppose the Commons or both Houses of Parliament should tender unto the King a bill, or bills, destructive of his own just rights, is he bound to pass such? Truly no—he may justly refuse them, for the end of his oath is to conserve and maintain the just laws which the people have chosen, or shall choose, for their good, not the unjust laws which they shall choose, to destroy or deprive him of his royal right. 'Jus regnandi' is the King's by descent even as 'jus regni' (to speak properly) is the people's by birthright (no way excluding the King from any benefit thereof). The people promise, or covenant by oath to obey the King as their Supreme Governor, or highest magistrate, and to maintain him, his heirs, and lawful successors, in his and their just rights and dignities. And as the King's oath tieth and obligeth him to the people, certainly the people's oath tieth and obligeth them to the King. Although our King in England be not a personal monarch, to make laws and govern at his pleasure, as some affirm that the great Turk, the King of Persia, and such like tyrannical Princes do (albeit I conceive,

that even these potentates are in some things limited) yet our King is a legal monarch, to reign and govern by laws made and consented unto by the people, so that although the King have not an absolute power to make laws, he hath an absolute power to administer the laws, and I hope there are none that will think or attempt otherwise.

Having said that the King is tied, by an implicit condition of his oath (admitting the verb "elegerit" to be understood in the preterperfect tense) to pass such bills concerning civil government as the Commons or both Houses shall tender unto him (not destructive to himself) and having said, notwithstanding, that the King hath a negative voice, or a voice to advise, and consequently not to pass such bills until he have advised—some, it may be, will say that there is a contradiction or opposition in these assertions, but there is none, for even every covenantor may, by the courtesy of the law, advise with himself and his own council, as well as with the council of his covenantee, before he make or do acts tending to the end of his covenant, and great reason it is that the King should have as great, or rather greater freedom in that he is the supreme ruler, or the highest magistrate of the Commonwealth. A freedom to advise, or to deny until advice be taken, defeats nul nec in foro conscientiæ, nec in foro juris, the tie or obligation of oath or covenant so far forth as such oath or covenant tieth or obligeth.

Furthermore concerning the King's oath aforesaid although he be tied and obliged by virtue thereof to

pass bills touching civil government as aforesaid yet I conceive that he is not tied and obliged by virtue of his said oath to pass bills touching religion tendered unto him by the Commons or both Houses of Parliament, for at the making of that oath neither the Commons, nor their representatives, or Trustees, nor the King, or his Lords or Peers, had anything to do, or did meddle with matters touching religion to define, frame or alter anything therein, such things were then altogether performed by ecclesiastical councils and assemblies, nor would the people, nor did they, tie or oblige the King by oath to do that which (as then) they conceived he had no power to do ; and the Kings who have successively taken that oath since the first making thereof, have taken their oaths according to the intent and meaning of that oath when first compiled and not otherwise, so that I do not conceive the King to be obliged by virtue of his said oath to pass bills touching religion tendered unto him by the Commons or both Houses of Parliament.

But some, it may be, will say that the King is tied otherwise, ex officio, to pass such bills touching religion as the Commons or both Houses shall tender unto him. It may be so, but, if so, yet both the King and both the Houses ought to be very cautious and conscientious how they make acts touching religion, in which they may err themselves, and by which they may ensnare and molest other men's consciences. However, the Kirkmen, having borrowed (I suppose) some infallible nightcaps from the Roman Bishops,

dream exceedingly that they interpret the Holy Scriptures without error of the least iota.

Master Jenkins saith that the King is principium, caput, et finis parliamenti. The King is principium, I grant him, for that the King by his writ appoints the time and place of parliamentary conventions: and that the King is caput I also grant it him in that the King is supreme ruler, or highest magistrate of the commonwealth but that the King is finis, at least-wise ' finis integer aut totalis parliamenti,' I deny it, for finis, or causa finalis, is causa propter quod, the cause for which a thing is ordained: and certainly salus populi which is the suprema lex, the safety of the people, their general good and welfare is the end, at least-wise, the principal end of Parliamentary Conventions, and Master Jenkins seemeth (in his Cordial to the good people of London), to acknowledge as much, for whereas Master H.P. barrister of Lincolns Inn affirmeth that the safety of the people is the supreme law (as indeed it is) Master Jenkins replying to him saith " Neither do we swear, but His Majesty and we will swear to the contrary and have sworn, and have made good, and will, by God's grace, make good our oath to the world that the King is not above the law nor above the safety of his people—the law and safety of the people are his safety, his honour and his strength." These are Mr. Jenkins own words, whereby he acknowledgeth that the safety of the people is the King's safety, honour, and strength, so that if the King be the end or a partial end of the Parliament, according to his assertion, the people's

safety must needs be the principal or ultimate end.

Master Jenkins saith that it cannot be said the King doth wrong and that it was declared by all Judges and Sergeants of law (tempore ?). The reason is, saith Master Jenkins, nothing can be done in this Commonwealth by the King's grant, or any other act of his as to the persons, goods, lands, liberties of the subjects but must be according to the established laws, which the judges are sworn to observe and deliver, between the King and his people, impartially to rich and poor, high and low: and therefore the justices and the ministers of justice are to be questioned and punished if the laws be violated and no reflection to be made on the King.

By Master Jenkins' favour, if it be granted that the King doth not wrong in ministering the laws, but that the ministers of the law, whom the King entrusteth do the wrong, will it therefore follow, that it cannot be said that the King doth the wrong, otherwise, both in his natural and politic capacity ? Surely no—The King may usurp and yet be a King de facto as did Henry I, his brother Robert being alive, and William II also, notwithstanding his Father's will. Stephen, Richard I and John his brother (for Arthur, son of Geoffry, Duke of Brittany, third son of Henry II was right heir to the Crown, Richard being the fourth son, and John the fifth son of the said King Henry): Edward III while his Father lived, for though his father were a dissolute prince, yet the son ought not to have usurped his right, and albeit a people may, as

did the petty Kings and people of Sodom and Gomorrah, the Jews, Athenians, Romans, and divers other nations, free themselves from tyranny and slavery yet they ought not to depose their King for vice. Henry IV that subtle usurper, Richard III that politic tyrant.

The King may break his faith and promise with his own people and others, as did the Norman and some of his successors very constantly as if it had descended to them with the Crown, and he may break his oath as did Henry III and some others.

The King may through his own covetous and ambitious desire impose illegal taxes upon the people, he may also engage himself and his people in unnecessary wars and broils as Kings have done. And if it be said that Kings are in such things many times misled by their councils, and therefore, they themselves ought to be excused I answer No—for the Kings ought not to be misled by their Councils "privatio rectitudinis in debito esse actus peccatum est." Kings have the means not to be misled in such matters if they will make use of them, but many times Kings will be led by Cabinet councillors, creatures of their own making, who depend upon them, and endeavour to humour and please their princes for their own ends, and not to counsel them according to prudence and justice and sometimes Kings have done what liketh themselves without council.

The King may, by an over-awing power, or by a kind of menacing, or high carriage, enforce, or cause the representatives of the Kingdom to do, or agree to

that to which, if such unjust and indirect means were not used, they would not agree unto, as did Henry VIII in obtaining the lands of Abbies and Monasteries, for admit the Abbies and Monasteries deserved to be dissolved, yet, forasmuch as their lands were terræ regni non regis, they ought to have been applied and employed to the good of the Kingdom, not of the King, there being then neither law, reason, nor precedent for it. But King Henry partly by frowns, mutterings, and threatenings, and partly by promising that he would with those lands maintain an army for the defence of the Kingdom, and ease the people from other taxes and payments (which how well he performed all men know) obtained and got into his hands those lands by consent of both the Houses of Parliament wherein how justly or unjustly both houses dealt, I will not dispute it at this time.

But to go on, Mr. Jenkins himself instanceth that in King John's time the nobles and commons of the realm conceiving that the ancient customs and rights were violated, etc. " et paulo post," after the subjects had obtained their rights and liberties which were no other than their ancient customs, etc. By which two instances of his he, in some sort, acknowledges that the people were wronged in their customs and rights from the time of the Norman conquest to the reign of Henry III. And who did the wrong? Surely the Norman and his successors who severally violated them, not such judges and justices of the laws who then were, for they did but as they were commanded. To conclude, the King may, in these and the like things both

according to his natural and politic capacity " peccare contra Deum, contra proximum et seipsum," and if it be said, notwithstanding, he can do no wrong, certainly that tenet, if it be ' ens legis,' it is ' scire ens rationis ratiocinatæ.'

That the King can do no wrong (in curia) nor the Pope err (in cathedra) I take them to be axioms much alike. For my part, I pretend not to the knowledge of the Laws, but honour the knowledge thereof. Thus much I know, " non jurari in verba magistri." I have heard say that the greatest Clerks are not sometimes the wisest men and I must tell Mr. Jenkins and others that sometimes also the greatest lawyers are not the soundest schoolmen, for if they were, some of them would not have said and written what they have. Mr. Jenkins saith the law and custom of this land is, that Parliament hath power over my life, liberty, lands and goods and over every other subject, etc. Pax cum pedibus, good Master Jenkins, not so fast ! What does Mr. Jenkins mean by the word power ? If he mean by the word power that the Parliament hath power to protect the lives, liberties, etc., of the people, I grant it him, or if he mean by the word power that the Parliament hath power applicare in necessitatem regni the properties of the people, I also grant it him but if Master Jenkins means by the word power that the Parliament including the King hath an absolute power to dispose of the people's estates, mere ad placitum I absolutely deny it. Moreover, the Parliament cannot tradere populum Angliæ alieno juri, deliver over the free people of England to a foreign

government, or to laws imposed by foreigners, or composed and continued in relation to foreigners, nor can the Parliament by any ordinance or act whatsoever deprive the free people of England of their innate right of electing Knights, Citizens, and Burgesses for Parliament. In these things, and things of the nature of these, tending to the fundamental rights and laws of the people, the Parliament cannot, nor ought not any way to violate the people or nation. If they do it, they do not only fall and fail from the protection of the people, but they become proditores et hostes patriæ. The King is to consider, that although he have his "jus regnandi," his crown by descent, and holds a Deo ordinaria per successionem, God himself being the efficient cause primarily, yet he holds it " in ordine ad populum," in relation to the people, who tie him by oath, etc. In England salus populi not majestas imperii is the chief object and end of Government. The representatives or trustees of the people are also to consider that they are " creati in ordine ad populum" not " nati in ordine ad se," as are the Venetian senators, that they are entrusted by the people according to the King's writ pro quibusdam arduis et urgentibus negotiis, not made unlimited or absolute in all things, so that the King and both the Houses of Parliament ought to endeavour for the general good of the Commonwealth.

I am of Master Jenkins' opinion, in this, that the safety of the people is the safety of the King, and that the honour of the King is supported by the honour of the people or nation.

A PLEA

DELIVERED TO THE EARL OF MANCHESTER AND THE SPEAKER OF THE HOUSE OF COMMONS SITTING IN THE CHANCERY AT WESTMINSTER WHICH WAS READ BY THEIR COMMAND IN OPEN COURT THE 14TH FEBRUARY, 1647 AND THERE AVOWED.

I HAVE been required to appear in Chancery the 12th of this instant February before Commissioners appointed by the two Houses for the Keeping of their Great Seal and managing the affairs of the Chancery.

I cannot, nor ought, nor will submit to this power. I am a Judge sworn to the Laws. The Law is, first, that this Court is Coram Rege in Cancellaria. Secondly the Chancellor, or Keeper of the Great Seal, is constituted and appointed by delivery of the Great Seal to him by the King—and by the taking of an oath.

The oath is as follows:—

1. Well and truly to serve our sovereign Lord the King and his people in that office.

2. To do right to all manner of people—poor and rich, after the Laws and usages of the Realm.

3. Truly to counsel the King and his counsel to conceal and keep.

4. Not to suffer the hurt or disheriting of the King or that the rights of the Crown be decreased by any means as far as he may let it.

5. If he may not let it, he shall make it clearly and expressly to be known to the King with his true advice and counsel.

6. And that he shall do and purchase the King's profit in all that he reasonably may, as God him help and the contents of God's book.

The said Commissioners, among others, have imprisoned their King, have declared to the Kingdom that they will make no addresses or applications to him nor receive any from him. They have counterfeited a new Great Seal and destroyed the true old Great Seal which belonged by the Law to the King's custody.

These Commissioners have had no seal delivered to them by His Majesty, have taken no such oath, or full ill kept it. And for these evident reasons grounded upon the fundamental laws of this land, these Commissioners have neither court, seal, or commission and therefore I ought not against the laws, against my knowledge and against my conscience to submit to their power.

To affirm that they maintain the King's power and authority in relation to his laws (as they often do) and restrain only his person, is strange.

They must be reminded that the House of Commons, this Parliament upon the prosecution of the Bill of Attainder against the Earl of Strafford declared the law to be, that machination of War against the laws, or Kingdom, is against the King—they cannot be severed.

Mr. Pym likewise upon the same prosecution declared the opinion of that House that the King and

his people are obliged one to another in the nearest relation. He is a Father, and the child (in law) is called pars patris. He is the husband of the Commonwealth. They have the same interests—they are inseparable in their condition, be it good or evil. He is the head, they are the body. There is such an incorporation as cannot be dissolved without the destruction of both. This agrees with our laws and the law of the land. In that argument of Mr. Solicitor and discourse of Mr. Pym directed by the House of Commons, are contained the true rights, liberties and laws of the people, deduced from our ancestors in all ages and wherein there is no line or word but is agreeable to the laws and is a necessary and useful book to be perused and followed by all—which book was published by order of the House of Commons. If the doctrine of that book had been followed we had not been so miserable as we are, neither had those great evils ensued for which the land mourns.

In this month of February, six years now passed, the only difference between His Majesty and the prevailing party in both Houses, was touching the power of the Militia, which in plain language, is power over sea and land. This was the sole quarrel. The King and his progenitors have had it in all times. The laws have fixed it upon them and they have used it for the weal of the people. None of the Subjects ever had it, or claimed it. The Laws deny it them. For the time they (the Parliament) have had it our pressures have been miserable.

His Majesty hath a numerous issue, and so hath his

Father, many great persons of England and Scotland and of the blood royal and all the Kings of Christendom are of the same blood. So long as the Laws last, or any of the said persons, or their descendants be living, this people shall have neither peace nor profit, but all the confusions that are imaginable will attend them.

And, therefore (at length), be good to yourselves, Restore our King. Receive from him an act of oblivion, a general pardon, assurance for the arrears of the Soldiery and meet satisfaction to tender consciences.

DAVID JENKINS,

12 *February*, 1647. *Prisoner in Newgate.*

IMPEACHMENT OF JUDGE JENKINS

AT THE HOUSE OF COMMONS BAR FOR HIGH TREASON. DIE LUNEA, 21 FEBRUARY, 1647.

MR. WOLLASTON the Keeper of Newgate brought this day to the Bar Mr. David Jenkins formerly a Judge in Wales, now a prisoner in that Gaol committed thereto, by this House, for high treason, according to an order sent him on Saturday last.

The House being acquainted that the prisoner was at the Door appointed the Sergeant of Arms to call him in, and accordingly he was brought to the Bar with the Mace before him.

Mr. Speaker (Lenthall) (according to the Order of the House, he being a Delinquent brought to trial) commanded him to kneel down but he refused—only put off his hat—and looked round about the House, and being told that he ought to kneel yet (although he had been a Judge himself and knew the Laws and that he ought to kneel and submit to the House in a Parliamentary way) he still continued obstinate and would not kneel at all.

The House proceeded to the reading of a Charge of High Treason and other high misdemeanours against him (divers citizens being then ready at the door if occasion was for them or any of them to be called in).

PARTICULARS OF CHARGES.

1. That the said David Jenkins to the betraying of the trust reposed in him, he being a Judge in Wales, did condemn several innocent men to suffer death for aiding and assisting the Parliament.
2. That he did himself take up arms actually against the Parliament, contrary to the known Laws of the Land to destroy them.
3. That in a Traitor's manner the said David Jenkins did stir up and combine forces to the disturbance of the peace of the Kingdom and actually levy war against the Parliament.
4. That the said David Jenkins hath (traitorously against the Parliament and the peace of the Kingdom) charged the Parliament and the Commissioners of the Great Seal with counterfeiting of a Great Seal—and has opposed the power of the Great Seal as illegal because it was not delivered to the Commissioners by His Majesty and has in a seditious manner charged the said Commissioners of the said Great Seal to have neither Court, Seal or Commission and therefore not to be submitted to.

The above having been drawn up from the examination of witnesses, were read to the Prisoner, to whom the Speaker, by order of the House, asked what he had to say.

Jenkins said that they had no power to try him—

and at the Bar in the open House gave very contemptuous words and reproaches against the Houses and the powers of Parliaments. And by a seditious construction quoted divers authors to traduce the power and proceedings of the Parliament with much venom and spleen. He was called in twice but went on in obstinacy in opposition to the House. He spake much and still in contempt of the power of Parliament. He said that six years since the difference between the King and Parliament was about the Militia pleading for the King to have it both by sea and land (whereby it is manifested he seeks to ruin the public weal). He said that Kings formerly did not enter into covenant with the people to maintain the law of the land but only to be merciful to the people.

He threatened the Parliament with the King's numerous issue of the many persons in Scotland of the Blood Royal and that during their life England shall have neither peace nor profit.

With divers other reproachful words such as the like were never offered in the face of Parliament and to which there was loud and frequent protest on the part of the members.

As he came out of the House he put off his hat and spoke to this effect before the soldiers of the Guard and divers gentlemen at the door:—

Gentlemen,

God bless you all. Protect the laws of the Kingdom—

When he was withdrawn some Gentlemen had discourse with him in the Lobby near to the House of

Commons door to see what reasons he could give for his obstinate malignant practices against the Parliament and the peace of the Kingdom who shewed him how contrary to law it was for him or any other to oppose the power of Parliament.

He pleaded still that there can be no law without the King, nor repeal of laws without him and continued to speak disgracefully of the Parliament. But when he was asked what obedience should be given to a King, who should be distracted or not capable of governing or who, in malice against his people, went about to destroy them and whether the Parliament ought not in such a case to protect the people, this and some other arguments put, did much puzzle him to answer.

In the meantime the House of Commons went into debate concerning him and passed the following votes:—

1. That the carriage of the said David Jenkins in opposition to the House is a high contempt and misdemeanour.
2. That the said contempt is a breach of the privileges of Parliament.
3. That for the said contempt against the House he shall be fined a thousand pounds.
4. That he be carried back to the prison of Newgate. After which the House proceeded upon an Ordinance against him, which had been twice read, but before it be passed, he is to receive a full trial for putting him to death.

(Jenkins took divers turns in the Court of Requests before the House of Commons sat (and the Lords not sitting this day) the people did so flock to see him that for better convenience and privacy he was taken into the Lobby of the Lords House, until he was brought to the Bar of the Commons.)

JUDGE JENKINS' REMONSTRANCE

TO THE LORDS AND COMMONS AT WESTMINSTER THE 21ST FEBRUARY 1647.

I DESIRE that the Lords and Commons of both Houses would be pleased to remember and that all the good people of England do take note of an order of the House of Commons this Session for publishing the Lord Coke, his books—which order they may find printed in the last leaf of the second part of his Institutes in these words, viz.:

Die Mercuris, 12 *May*, 1641.

Upon debate this day in the Commons House of Parliament the said House did then desire and held it fit that the Heir of Sir Edward Coke should publish in print the commentary upon Magna Charta, the Pleas of the Crown, and the Jurisdiction of Courts according to the intention of the said Sir Edward Coke, and that none but the Heir of the said Sir Edward Coke or he that shall be authorised by him, do presume to publish in print any of the foresaid books or any copy thereof.

H. ELSYNGE, *Clerk.*

And I do further desire them that they would read and peruse Mr. Solicitor St. John and Mr. Pym their Books, published likewise this Session whose Titles are as followeth, viz.:

An Argument of Law concerning the Bill of Attainder of High Treason of Thomas, Earl of Strafford, at a Conference in a Committee of both Houses of Parliament. By Mr. St. John, His Majesty's Solicitor General.

And the speech or declaration of John Pym, Esq., after the Recapitulation or summing up of the charge of High Treason against the said Thomas Earl of Strafford (12 April, 1641).

1. Nothing is delivered for law in my Books but what the House of Commons have avowed to be law in Books of Law, published by their command this Session and agreeable to the Books of Law and Statutes of this Realm in all former times and Ages.

2. The supposed offence charged on me is against the two Houses, and none ought to be Judges and Parties by the law of this land in their own case.

3. I desire the benefit of Magna Charta, the Petition of Right and other good laws of this land which ordain that "all men's trials should be by the established laws and not otherwise." They are the very words of the Petition of Right. An ordinance of both Houses is no law of the land, by their own confession, and by the books of the Lord Coke published by their order, as aforesaid, this Session. For sedition, in my books, there is none but such as they have authorized to be published and printed—To publish the law is no sedition. These positions following I do set down for the law of the land in my books and they themselves have justified and avowed them as aforesaid. We agree the Law to be, and to have been in all times in all particulars following as here ensueth:—

1. To imprison the King is High Treason.
2. To remove Councillors from the King by force is High Treason.
3. To alter the established Laws in any part by force is High Treason.
4. To usurp the Royal Power is High Treason.
5. To alter the Religion established is High Treason.
6. To raise Rumours and give out words to alienate the People's affection from the King is High Treason.
7. To sess soldiers upon the people of the Kingdom without their consent is High Treason.
8. The execution of paper orders by Soldiers in a military way is High Treason.
9. To counterfeit the Great Seal is High Treason.
10. The Commission of Array is in force and none other.
11. None can make Judges, Justices, Sheriffs, etc., but the King. The King makes every Court.
12. The Great Seal belongs to the King's Custody or to whom he shall appoint and none other.
13. Ordinances of one or both Houses are no laws to bind the people.
14. No privilege of Parliament holds for Treason, Felony or breach of peace, not for twenty Parliament men, forty nor three hundred.
15. To subvert the fundamental laws is High Treason.
16. To levy war against the person of the King is High Treason.

17. To persuade Foreigners to levy war within this Kingdom is High Treason.
18. To impose unlawful taxes, to impose new oaths, is High Treason.
19. The King can do no wrong.
20. It is a pernicious doctrine to teach subjects they may be discharged from the oath of allegiance. Then what means the doctrine of both Houses or the votes of the 11th February, 1647.
21. A necessity of a man's own making doth not excuse him. The requiring and forcing of the militia brought the necessity of arming upon the Houses.
22. None can levy war within this Realm without authority from the King, for to him only it belongeth to levy war by the Common Law of England, to do otherwise is High Treason by the said Common Law.
23. No Parliament without the King. He is Principium caput et finis.
24. Presentment or Trial by Jury is the birthright of the subject.

There is no doubt that many in both Houses are free from this great Sin, and that most of the prevailing party had at first no intentions to proceed so far, but the madness of the people (who are very unstable and so they will find them) and the success of their armies (having this great rich city to supply them with all accommodations) have so elated them that the evil has come to this height.

For myself, to put me to death in this cause is the greatest honour I can possibly receive in this world. Dulce et decorum est mori pro patria. And for a Lawyer and a Judge of the Law to die 'dum sanctis patriæ legibus obsequitur,' for obedience to the Laws will be deemed by good men of this time a sweet smelling sacrifice, and by this and future times that I died full of years and had an honest and honourable end, and posterity will take knowledge of those men who put some to death for subverting of the Laws and others for supporting of them, etc.

Yet mercy is above all the works of God. The King is God's vicar on earth. In Bracton, who was a Judge in Henry the third's time, you shall find the King's oath. To shew mercy is part of it. You are all his subjects and He is your King and Parent. Pro magno peccato paululum supplicii satis est patri. And therefore let not the prevailing party be obdurate out of a desparation of safety. That which is past is not revocable. Take to your thoughts your Parents, your Wives, your children, your friends, your fortunes, your Country wherein Foreigners write there is mira aëris suavitas et rerum omnium abundantia. Invite them not hither. The only way to be free of their company will be to restore His Majesty and receive from him an act of oblivion, and a general pardon. God preserve the King and the Laws.

DAVID JENKINS,
Prisoner in Newgate.

AN ACCOUNT OF WHAT PASSED IN THE HOUSE OF COMMONS

AT WESTMINSTER A.D. 1647 WHEN THAT HOUSE VOTED DAVID JENKINS ESQ. A WELSH JUDGE TO BE GUILTY OF HIGH TREASON AGAINST THEMSELVES WITHOUT ANY TRIAL—RELATED BY D.T., WHO HAD IT FROM THE MOUTH AND NOTES OF ONE SIR FRANCIS BUTLER.

In the year 1682 I went and resided in the Town of Hertford and there continued for about five years during which time I became acquainted with many gentlemen of Hertfordshire who had been loyal among whom was Sir Francis Butler whose seat was about a mile from Hatfield—a gentleman of great knowledge and ingenuity and of inflexible loyalty who was in the commission of the Peace and was one of the Burgesses of the Commons House of Parliament for the town of Hertford. I have been informed that in his younger years he was educated under the influence of the late great Earl of Strafford, the martyr for King Charles I.

It was my good fortune to become intimately acquainted with this worthy Gentleman, who seemed to be then above seventy years of age. He told me that Judge Jenkins and he were prisoners together in the Tower of London, and after in Newgate, in the time of the rebellious House of Commons. And I having

desired him to give me an account of the proceedings against them he acquainted me as followeth: That Judge Jenkins and he having been taken out of the Tower and committed to Newgate were by order of that rebellious House of Commons brought before them where, being both at the Bar of that House, Lenthall the Speaker made a speech to them to this effect:

That it was notorious that they two had been most violent malignants and traitors to that Honorable House wherefore the House intended to proceed against them as traitors to the Parliament (meaning their wicked House only). And in particular he said to Judge Jenkins that his behaviour was taken notice of by the House, in his not paying any obeisance to the chair when he came to the Bar, which was the greater fault in him, seeing he pretended to be knowing in the laws of the land. Sir Francis told me that during this speech of Lenthall's Judge Jenkins had prayed him softly not to speak much, so as to let all their malice fall on him only, since he was in years, and Sir Francis but young, in respect to him. And when the Speaker's speech was ended, Judge Jenkins asked whether they would now give him liberty to speak? "Yes," answered Lenthall, "so you be not very long." "No," said the Judge, "I will not trouble either myself or you with many words. In your speech, Mr. Speaker, you said the House was offended at my behaviour in not making any obeisance to you at my coming here and this was the more wondered at because I pretended to be knowing in the laws of the

land. In answer to which Mr. Speaker, I say, that I thank God, I not only pretend to be, but am knowing in the laws of the land having made it my study for these five and forty years and because I am so, that was the reason of such my behaviour, for as long as you had the King's arms engraved on your mace and acted under his authority had I come here I would have bowed my body in obedience to his writ and authority by which you were first called, but Mr. Speaker, since you and the House have renounced all your duty and allegiance to your Sovereign and natural liege Lord and King, and are become a den of thieves should I bow myself in this House of Rimmon, the Lord would not pardon me in this thing." Upon which the whole House fell into such an uproar and confusion that for half an hour they could not be reduced into any order, for sometimes ten, sometimes twenty would be all speaking together, but at length the fury abated and the House voted that he was guilty of High Treason (without any Trial at all) and should suffer as in cases condemned for treason. So they called for the Keeper of Newgate Prison to know the usual days for execution in such cases. He told them it was usually on Wednesdays and Fridays and then was debated whether it should be done on next Wednesday or Friday. Then up stood Harry Martin* (the droll of that House) who had not spoken before. He said he would not go about to meddle in their vote, but as to the time of execution he had something to say. "Mr. Speaker," says he, "every one must

* Subsequently one of the Regicides.

believe that this old gentleman here is fully possessed in his head; that he is ' pro aris et focis mori ':—that he shall die a martyr for this cause—for otherwise, he never would have provoked the House by such biting expressions, whereby, it is apparent that if you execute him, you do what he hopes for, and desires and whose execution might have a great influence upon the people since not condemned by a Jury. Wherefore my motion is, that this House would suspend the day of execution and in the meantime force him to live in spight of his teeth." Which motion of his put the House into a fit of good humour and they cried—" suspend the day of execution." So he was returned back again to Newgate Prison, and being there Sir Francis asked the Judge whether he had not been too hardy in his expressions to the House. " Not at all," said he, " for things of a rebellious nature have been so successful in this Kingdom, and have gotten such a head, that they will almost allure the weak, loyal men to comply therewith, if some vigorous and brave resistance is not made against them and to their very faces, and this was the cause why I said such fierce things to them yesterday. And although I have opposed rebels and traitors all my life hitherto, yet I persuade myself, that at the time of my execution, on the day of my death, I shall be like unto Samson and destroy more Philistines than ever I did in all my life, that is, confound their rebellious assertions. And in this thought of mine I am so wrapped up that I hope they won't totally suspend my execution. I will now," said the Judge,

" tell you all that I intend to do and say at that time. First I will eat much liquorish and gingerbread thereby to strengthen my lungs, that I may extend my voice far and near for no doubt there will be great multitudes at the place. And then I will come with Bracton's book hung upon my left shoulder with the Statutes at Large hung on my right shoulder, and the Bible with a ribband put round my neck and hanging on my breast. Then I will tell the people :

" ' That I was brought there to die for being a Traitor. Indeed if this be true, I was not fit to live. And believe the words of a dying man, I heartily wish that all rebels and traitors in the Kingdom would come to my fate. But to inform you all better that I never was a Traitor, is this, that even the House of Commons itself did not think I was a traitor, for had they believed this they would have had me tried for the same in a fair and legal manner, according to the constant custom used in this Kingdom for a thousand years: that is to say to be tried by a Jury, which they feared to let me have for they well knew that no honest Jury could ever have found me guilty of treason for being only loyal and true to our lawful and rightful sovereign the King. For this cause it was they debarred me of my birthright—a trial by my Peers, that is by a jury, although in a case of life and death. So it is notorious that they did not think me guilty according to law: but yet, thinking still after my blood they found a new unheard of way to bring me to my death and that was by voting me guilty of High treason. And by

the same detestable way they may vote ten thousand of you at once guilty of treason, then hang you like me and seize all your Estates. And this they will do when they find it convenient to support their tyrannous power. Yet notwithstanding my known innocence in their conscience, they, against all right and conscience, have sentenced me to die for treason. Well then, since they will have me a Martyr, right or wrong, and here I must die for the same, I thought it was but just to bring my Counsellors with me, who have all along advised me in what I have done. That these, I say, ought therefore to be hanged as well as I, for they are as much guilty as I. Then,' said he, ' I will first take Bracton who, I will inform them, was one of our most famous ancient lawyers (who wrote in the reign of King Henry III, towards the latter end of it). He says, lib. 4, cap. 24 s.l. Rex habet postestatem et jurisdictionem qui in regno suo sunt ea quæ sunt jurisdictionis et pacis ad nullam pertinent, nisi ad regiam dignitatem, habet etiam coertionem ut delinquentes puniat et coerceat, etc. Which proves the supreme power to be in the King. Again at Sec. 5, too, he says omnis sub rege et ipse sub nullo nisi tantum Deo, etc. Non parem habet in regno suo. Which further proves he is supreme and others are subordinate and subject to him. Again lib. 5, etc. Tract 3, cap. 3, etc. Rex non habet superiorem nisi Deum; satis habet ad pœnam quod Deum expectat ultorem. Which undeniably proves him to have the supreme power and that one or both

Houses of Parliament had no supreme power but were under obedience and duty, as being his subjects. So then I will tell the people this Book was one of my evil counsellors so was to be hanged with me. Then,' said the Judge, 'I will open the Statute Book that hangs on my right shoulder and read to the people what is enacted, and declared to be law in the Oath of Supremacy made in the first year of Queen Elizabeth which oath the subjects of this Kingdom are obliged to take, especially all Parliament men. They therein do swear, testify and declare in their conscience that the Queen (or King) is the only supreme Governor of this realm as well as in all spiritual and ecclesiastical things and causes as in temporal, etc., and do promise to bear faith and true allegiance to the King, his heirs and lawful successors, etc. Where I will note to them that the word lawful is not put before the word heirs for that would have been tautology only, since no person can have an heir but who is lawful for the law nominates who is heir to everyone. But the epithet lawful is placed immediately before the word successors, and it is too well known that several of our lawful Kings have had unlawful successors, and to such this oath doth not extend, nor anything within the intent or meaning of the said oath. Then,' said the Judge, 'I will open to the people the oath of allegiance made in the third year of King James, where again the subjects swear to bear faith and true allegiance to the King his heirs and successors and them will defend to the utmost of their power

against all conspiracies whatsoever against their person, crown or dignity, etc. And also that they believe in their conscience and are therefore resolved that neither the Pope nor any person whatsoever hath power to absolve them of this oath (where other excellent matters are contained), etc. Which makes it clear to a demonstration, that they who have taken the said oaths (and all the Commons House have taken them) and yet do not pay allegiance and obedience to the lawful sovereign, all such subjects are not only rebels and traitors to the King but also are perjured, at least forsworn into the bargain. So then,' said the Judge, 'this book of Statutes being another of my evil Counsellors I think it should also be hanged with me. Then,' said he, 'I will open the Bible that is upon my Breast and read to them out of the 13th Chapter (1) of the Romans "Let every soul be subject unto the higher powers, for there is no power but of God: the powers that be are ordained of God. Whosoever, therefore, resisteth the power resisteth the ordinance of God and they who resist shall receive to themselves damnation." Verse v, "Wherefore ye must needs be subject, not only for wrath, but also for conscience sake." Then I will open and read to them also the 2nd Chapter of St. Peter first epistle and 13th "submit yourselves to every ordinance of man for the Lord's sake, whether it be to the king as supreme, or unto governors, as unto them who are sent by him for the punishment of evil doers, and for the praise of them that do

well, for so is the will of God that with well doing ye may put to silence the ignorance of foolish men." And then I will observe to them from St. Paul, " That the higher powers to whom all are to be subject are the King " for St. Peter here saith in express words " That the King is supreme," so must be the higher powers mentioned by St. Paul. Again where St. Paul saith—" There are no powers but of God " and the powers that be are ordained of God " these powers here mentioned must of necessity be understood to be such powers as are lawful and not such powers as thieves, pirates, banditti, rebellious men or usurpers sometimes acquire. Surely such are not be obeyed for con science sake under the penalty of damnation, for by so doing we should be partakers of their notorious sins and would thereby be accomplices in their guilt. And our Saviour Himself said " Render unto Cæsar the things that are Cæsar's." He does not say " Render to the Senate of Rome any thing " and yet they had much better pretence to rule than our House of Commons.—So, good people, this Holy and Sacred Book has also been another of my evil Counsellors, and therefore shall also hang with me, for I will not part with it whilst I have breath. So,' said the Judge, ' when they shall see me die affirming these things, it will cause thousands to enquire further into this matter and having found all I told them to be true, they will loathe and detest the present tyranny.' "

But no day for execution was ever appointed—the

Rehearsal was all in vain—yet afterwards the House of Commons sent a Committee to the Judge at Newgate to make this offer to him, that if he would own their lawful power they would not only take off the sequestration from his Estate but would also settle a pension on him for life of £1,000 a year. To which he answered, far be it from him to own rebellion (although it was successful) to be just and lawful: so he desired to see their backs. Then the chief of them made another proposal to the Judge, and said he should have the same as was mentioned above, if he would but permit and suffer them to put in print that he did own and acknowledge their power to be lawful and just and would not gainsay it. To this he answered he would not connive at their so doing for all the money they had robbed the Kingdom of, and should they be so imprudent as to print any such matter he would sell his doublet and coat to buy pens ink and paper and would set forth the Commons House in their proper colours, that is, would make them appear to be scandalous, impudent and lying rebels. When they found him so firm one of the Committee used this motive: "You have a wife and nine children who will starve if you refuse this offer, so consider for their sakes—they make up ten pressing arguments for your compliance."

"What!" said the Judge. "Did they desire you to press me in this matter?" "I won't say they did" replied the Committee man, "but I think they are a pressing argument without their speaking at all." With that the old man's anger was heightened to

the utmost and, in a passion, said: "Had my wife and children petitioned you in this matter I should have looked on her as a Whore and them as Bastards."

Upon this the Committee departed and he continued under restraint in Newgate or elsewhere until the Restoration, soon after which I have been informed that this most heroical and loyal Judge died, whose memory and doings ought never to be forgotten by loyal men.